IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-974

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

and

PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

MILWAUKEE COUNTY,
Applicant for Limited Intervention.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Milwaukee County, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 24, 1978 denying the application of Milwaukee County for limited intervention as defendant, sought for the purpose of moving for dismissal or a partial new trial on the basis of its absence as an indispensable party.

OPINION BELOW

The order of the Court of Appeals, not reported for publication, appears in the Appendix hereto. The transcript of the July 29, 1977 proceedings of the District Court for the Northern District of Illinois containing the "Findings of Fact and Conclusions of Law", together with the subsequent stipulation of the parties dated November 14, 1977 and the judgment of the District Court dated November 15, 1977, likewise appear in said Appendix. No written opinion was issued on the merits of the case by the District Court prior to said judgment, nor was any written opinion issued by the Court of Appeals prior to its summary order denying intervention dated August 24, 1978. The Seventh Circuit Court of Appeals has not as yet handed down its opinion on the appeal by the defendants from the District Court judgment, and no judgment has been entered at the appellate level.

JURISDICTION

The jurisdiction of the Supreme Court to review the order of the Circuit Court of Appeals for the Seventh Circuit dated August 24, 1978, denying intervention, is invoked under 28 U.S.C. §1251(1) and 28 U.S.C. §2101(e) because judgment on defendant's appeal filed November 21, 1977 has not been rendered in the Court of Appeals.[1]

QUESTION PRESENTED

Is Milwaukee County now a necessary and indispensable party to the lawsuit on the issues of remedy and ex-

[1] See *Auto Workers v. Scofield*, 382 U.S. 205 (1965).

tent of remedy, whose joinder was required for the just adjudication of the legal controversy involved in this litigation?

STATUTORY PROVISION INVOLVED

1975 Wisconsin Statutes:

Section 59.96(1), section 59.96(6) (as amended by Ch. 379, s. 33, Laws of 1977), section 59.96(7), Section 59.96 (8) (as amended by Ch. 382, Laws of 1977), Section 59.96(9) (as amended by Ch. 382, Laws of 1977), and Section 59.96(10). The text of this provision appears in the Appendix hereto.

The 1977 amendments to this statutory section in no way lessen the financial obligation imposed on the County by the statute, nor do they lessen the County's liability in terms of compliance with the remedy mandated by the District Court.

STATEMENT OF THE CASE

Jurisdiction of the District Court was invoked under 28 U.S.C. §1331 as a cause of action under the federal common law of nuisance, and 28 U.S.C. §1332 as a suit between a state and citizens of another state.[2]

The underlying dispute in this case concerns an allegation by Illinois and Michigan that the City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of

[2] Defendants have challenged the District Court's jurisdiction and venue. A ruling dismissing defendants' motion on this point, *Illinois v. Milwaukee*, 4 E.R.C. 1849 (N.D. Ill. 1972), is presently before the Court of Appeals on defendants' appeal of the District Court's judgment after trial.

the County of Milwaukee are polluting Lake Michigan, a body of interstate water. Plaintiffs claim that defendants discharge raw or inadequately treated sewage into the lake, and that such discharge creates a public nuisance under federal common law. Plaintiffs also allege as pendant claims that defendants are violating the Illinois Environmental Protection Act[3] and the Illinois common law of nuisance. Illinois initially requested leave to file a complaint in this Court under its original jurisdiction, but that request was denied, *Illinois v. Milwaukee,* 406 U.S. 91 (1972), and Illinois thereafter commenced this action in District Court.

Following an extended trial, the District Court in July, 1977 found defendants liable under all three causes of action.[4] Judgment was entered in November, 1977 requiring defendants to substantially modify their sewage collection and treatment system so as to discharge only effluent which meets or exceeds certain stated standards.[5] The discharge standards specified by the District Court are six times more stringent — and many times more costly — than those specified by otherwise applicable federal law.[6]

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[3] Ill. Rev. Stat. Ch. 111-1/2, §1012.

[4] The District Court dictated its "Findings of Fact and Conclusions of Law" from the bench on July 29, 1977. See pp. 16-51 of the Appendix hereto for the transcript of the District Court's decision.

[5] The District Court's "Judgment Order" of November 15, 1977 requires defendants to (i) eliminate all sewage overflows and bypasses; (ii) create substantial new sewage storage capacity; and (iii) treat all sewage so that effluent discharges have a free chlorine residual and do not contain more than 5 milligrams per liter of suspended solids, 5 milligrams per liter of five-day carbonaceous biochemical oxygen demand, or 40 fecal coliform per 100 milliliters.

[6] Compare the effluent requirements stated at pp. 5-6 of the Appendix hereto with the "secondary" sewage treatment levels specified by the United States Environmental Protection Agency at 40 C.F.R. §133.102, i.e., principally a 30/30 effluent standard as contrasted with the severe 5/5 standard directed by the District Court. Such secondary treatment levels were incorporated into discharge permits issued to defendants pursuant to the National Pollutant Discharge Elimination System, Sections 401 et seq. of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500; 33 U.S.C. §§1341 et. seq.).

Defendants have appealed the District Court's judgment on various grounds not here relevant, and the matter is presently pending decision (briefs and supplemental memoranda having been filed and oral argument held).

The impact of the District Court's decision was thoroughly studied and debated in County Board committee hearings, and on May 23, 1978 a resolution was adopted by the Board directing the County's legal counsel to file a motion for dismissal of the action in the Circuit Court of Appeals for the Seventh Circuit on the ground "that an indispensable party to the litigation, namely Milwaukee County, was absent from the case . . ." The resolution took effect on June 20, 1978, and a month later the County's motion for dismissal was filed in the Office of the Clerk of the Court of Appeals for the Seventh Circuit. After the County's motion for limited intervention was denied by court order on August 24, the County Board again considered the legal implications of the order of denial, and on November 9, 1978 adopted a further resolution authorizing legal counsel to petition this Court for a writ of certiorari "to review and overturn the denial by the 7th Circuit Court of Appeals of the motion by Milwaukee for intervention as an indispensable party." A copy of this further resolution appears in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. PROMPT SETTLEMENT OF THIS ISSUE PRIOR TO JUDGMENT BY THE COURT OF APPEALS IS IN THE PUBLIC INTEREST.

At the outset of this part of the County's petition the Court's attention is called to the full name of the third defendant on the appeal of this action now pending in the Court of Appeals, i.e., the Metropolitan Sewerage Commission of the County of Milwaukee. That defendant is an independent governmental agency and is not in any way under the jurisdiction of the County of Milwaukee. It is a separate corporate entity authorized and established by the state statutes. The members of its governing body are not appointed by, responsible to, or under the jurisdiction of the County or its elected or appointed officials. The commission members are appointed by the governor pursuant to section 59.96(1) of the Wisconsin Statutes, and thus the commission might be likened to a quasi-state agency.

This distinction is vitally important to the outcome of the instant petition, because it cannot be claimed that the Metropolitan Sewerage Commission or its attorneys in any way represent the legal or equitable interests of Milwaukee County in this action. Prior to Milwaukee County's application for intervention made to the Court of Appeals, the county government was not a participant in this proceeding in any manner whatsoever. It has neither chosen counsel for any of the defendants nor determined any strategy of the defense. Thus there is no basis for a claim that Milwaukee County was adequately represented at the trial or subsequent thereto by any of the named defendants.

The application of Milwaukee County for limited intervention as a defendant in this matter is of sufficient and imperative public importance so as to justify settlement in this Court under Rule 20 of the rules of the Supreme Court before a decision on the merits of the controversy is made by the Court of Appeals for the Seventh Circuit.[7] Failure to grant the application would result in a legal precedent that would have the effect of subjecting many municipalities throughout the country served by sewage treatment plants, where the discharge of effluents can be found to be a common law nuisance in federal courts, to the payment of prohibitive costs through tax levies to pay for unproven treatment processes, and ultimately to contempt sanctions for non-compliance, all because they have not had a chance to represent themselves in the common law nuisance enforcement action. Put differently, their rights would be affected without their presence in court. In effect, they would be subjected to taxation without representation, one of the basic grievances for which the American Revolution was fought and won 200 years ago. The exposure to these extraordinary costs could not have been anticipated when the Wisconsin Legislature delegated independent taxing power to the Metropolitan Sewerage District of Milwaukee County, especially when it is considered that such costs, if financed by bonded indebtedness, may eventually pierce the state constitutional debt limit imposed upon Milwaukee County, or if financed by property taxes,

[7] In a similar case of imperative public importance, *United States v. United Mine Workers,* 330 U.S. 258 (1947), this Court granted petitions for certiorari prior to judgment in the Circuit Court of Appeals. It was there stated by former Chief Justice Vinson, speaking for the Court, at page 269: *"Prompt settlement of this case being in the public interest,* we granted certiorari . . ." (Emphasis added) See also *Rickert Rice Mills v. Fontenot,* 297 U.S. 110 (1936).

would distort in an irreparable manner the conduct of local affairs and public financing in the affected areas. Likewise, such unprecedented financial exposure could not have been reasonably anticipated by the County as a non-party to the federal lawsuit during the course of the litigation prior to the findings and judgment of the District Court.[8]

The denial by the Court of Appeals of county intervention in this particular case has much more than local importance. Any community could similarly be subjected to a crushing tax levy without the right of due process, i.e., the right to be heard by a court which — as here — ratified a stipulation that waived rights of Milwaukee County as a non-party, and which — as here — made no finding of record of any basis for virtual representation (if, indeed, any such finding could be supported and made at all) that resulted in the exclusion of the County in its role as an elected tax collecting governmental body.

2. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

We urge this Court to consider the direct effect on Milwaukee County in the face of its absence from the litigation in the District Court. The financial interests of Milwaukee County and its taxpayers are irreparably affected by the remedy granted by the District Court. To carry out the judgment and the underlying stipulation with or without substantial federal funding would in-

[8] See *Reserve Mining Co. v. Environmental Protection Agency,* 514 F.2d 492 (8th Cir. 1975).

crease the local property tax share of compliance expenses from $500 million up to $1,500 million, and those increased local taxes and every part thereof would have to be levied by and collected by Milwaukee County pursuant to its statutory obligation as set forth herein.

Because of such irreparable harm, the only adequate protection that can be granted to Milwaukee County is a dismissal of the case without prejudice to the plaintiffs or a partial new trial with Milwaukee County as a party but with the stipulation and judgment of the District Court vacated. As the United States Supreme Court stated in *Provident Bank and Trust Co. v. Patterson,* 390 U.S. 102, 111 (1968):

> "When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below."

As plaintiff, the State of Illinois was required to bring before the court all parties necessary for disposal of the issues in the lawsuit, including the issue of ability to pay for the remedy. (Fed. Rules Civ. Proc. Rule 19, 28 U.S.C.A.) The failure of Illinois to have done so should not have precluded Milwaukee County from asserting its indispensability through an intervention motion in the Court of Appeals. Under Rule 19, the fact that Milwaukee County was not joined at the District Court level is not fatal. Nor is it fatal that the lack of an indispensable party was not briefed or argued in the Court of Appeals. The absence of an indispensable party can be raised by that party or by the Court at any time and the defense of failure to join an indispensable party can never be waived. Because the District Court allowed the stipulation and judgment (both prejudicial to Milwaukee County) to be entered in the absence of the County, and

because the Court of Appeals denied the County's motion for limited intervention, the right of Milwaukee County to submit this petition and to have it seriously entertained survives both the trial and judgment as well as the Court of Appeals' bare denial order. *Boles v. Greeneville Housing Authority,* 468 F.2d 476 (6th Cir. 1972); *McShan v. Sherrill,* 283 F.2d 462 (9th Cir. 1960).

Whether or not one is an indispensable or necessary party cannot be determined from a prescribed formula. Each case depends upon its own facts and the nature of the interest that the person has in the controversy. *Niles-Bement-Pond Co. v. Iron Moulders Union,* 254 U.S. 77 (1920). One principle that is established, however, is that "joinder of claims, *parties* and remedies is strongly encouraged." (Emphasis supplied) *United Mine Workers v. Gibbs,* 383 U.S. 715, 724 (1966).

The government of Milwaukee County, as applicant for limited intervention, filed with its motion papers in the Court of Appeals a proposed motion to dismiss this action on appeal, without prejudice to any rights of plaintiffs. However, the alternative relief which this Court could provide is a remand of the case to the Court of Appeals with directions that the stipulation and judgment entered in the District Court be vacated and that a partial new trial be granted on the issue of remedy. That relief could be granted by the Court on its own initiative, as noted in *Provident Bank and Trust Co.* on page 9 of this present petition. And authority for the proposition of a partial new trial can be found in *Leary v. United States,* 224 U.S. 567, 576 (1912), where Mr. Justice Holmes, speaking for the Court, said:

> "On the whole matter it seems to us that she [petitioner] was dealt with too technically. She represents a case which unless read with an adverse mind is a good one on its face, and whatever misgivings we may entertain, we are of opinion that she ought to be allowed to try to prove it. In the circumstances it seems to us that the leave to intervene may be granted subject to the condition that the evidence already in shall be taken to be evidence against her subject to her right to recall and cross-examine such witnesses for the Government as she may be advised.
>
> *Decree reversed."*

Pursuant to Rules 19 and 24 of the Federal Rules of Civil Procedure, Milwaukee County was a person needed for just adjudication of this matter. Accordingly, Milwaukee County should have been joined as a party defendant in the District Court. The absence of Milwaukee County in the present action, after the District Court determined liability, now has the effect of making any decision and judgment on the merits by the Court of Appeals, except as noted below, entirely prejudicial to that governmental body because the County did not have an opportunity to protect its interest in the District Court, and now lacks such opportunity in the Court of Appeals, as to the extent of its liability in this matter. Such prejudicial effect would be avoided if this Court saw fit to enter either a judgment for dismissal, with leave for plaintiffs to commence another action against the named defendants and the County of Milwaukee, or an alternative order on its own initiative directing the Court of Appeals to vacate the stipulation and judgment of the District Court and to grant a new trial on the issues of remedy and the financing of the remedy.

Rule 19(a)(2) of the Federal Rules of Civil Procedure describes a party who shall be joined as one who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede

his ability to protect that interest . . .". The subject of this action at the trial court level was whether the named defendants were responsible for discharging effluent into Lake Michigan which traveled to Illinois waters and caused a federal common law public nuisance there. During the course of trial Milwaukee County was certainly not a party needed for just adjudication of liability. Much later, however, when all of the evidence had been presented and the District Court had determined that the defendants were responsible, Milwaukee County — because of its statutory obligation to levy and to collect property taxes to pay for the capital costs of any court ordered remedy — then became necessary and indispensable to the fashioning of a just and fair remedy. Once the defendants were found to be liable, the District Court had the responsibility to determine the proper remedy. The remedy necessarily involves great sums of money, and because Milwaukee County would be the primary source of the funds needed, it was then and is now a necessary and indispensable party needed for the just adjudication of the matter.

A similar fact situation existed in *Armco Steel Corp. v. United States,* 490 F.2d 688 (8th Cir. 1974) and its successor case of *Reserve Mining Co. v. Environmental Protection Agency,* 514 F.2d 492 (8th Cir. 1975). Those cases involved the alleged pollution of Lake Superior by Reserve Mining Co. In the first case, the trial court entered an interlocutory order joining the mining company's two parent corporations as defendants, but the appellate court reversed the order as premature and remanded the case for further proceedings to determine liability. Upon completion of the trial, the lower court found liability for pollution on the part of the mining company, and again ordered the two parent corporations joined as defendants. The joinder order was upheld

on appeal since the remedy determined by the court had a direct financial impact on the parent corporations.

Milwaukee County's position is analogous to that of the two parent corporations in the cases above cited. Milwaukee County neither concedes nor disputes the fact of liability at this time. However, once liability was adjudicated by the District Court, Milwaukee County attained such interest in the subject of the action, i.e., the relief to be afforded the plaintiffs, that it became necessary and indispensable to the action. Prior to determining the proper remedy, Milwaukee County should have been joined as an indispensable party so as to allow it to bring before the District Court the fact that its tax and bonding revenues are the primary sources of funds for payment of the remedy ordered, and to allow it to protect its interest in the relief granted. The District Court's remedy established in the absence of Milwaukee County directly affected the county's interest. See also *Gottlieb v. Vaicek,* 69 F.R.D. 672 (N.D. Ill. 1975), affirmed without opinion by the Court of Appeals for the Seventh Circuit in 1976 (544 F.2d 523); and *Bloch v. Sun Oil Corporation,* 335 F. Supp. 190 (W.D. Okl. 1971).

Milwaukee County is also faced with the possibility of exceeding a Wisconsin Constitutional debt limitaton. Article XI, Section 3 of the Wisconsin Constitution provides in part:

> *"Municipal home rule; debt limit; tax to pay debt.* SECTION 3 * * * * No county, city, town, village, school district or other municipal corporation may become indebted in an amount that exceeds an allowable percentage of the taxable property located therein equalized for state purposes as provided by the legislature. In all cases the allowable percentage shall be five per centum . . ."

The two exception clauses following the above debt limitation provision apply to cities and school districts for school purposes and not to county debt. Thus Milwaukee County's legal authority to issue municipal bonds in order to secure payment of sewerage expenses is severely restricted by our state's fundamental law.

CONCLUSION

For these reasons a writ of certiorari should issue to review the summary order of the Court of Appeals for the Seventh Circuit, together with the decision and judgment of the District Court for the Northern District of Illinois, in this matter because of the absence of Milwaukee County as an indispensable party on the issues of remedy and extent of remedy.

Respectfully submitted,

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December 13, 1978

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II

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PEOPLE OF THE STATE OF ILLINOIS, ex rel., WILLIAM J. SCOTT, Attorney General of the State of Illinois,
Plaintiff,
PEOPLE OF THE STATE OF MICHIGAN,

v.

CITY OF MILWAUKEE, WISCONSIN; CITY OF KENOSHA, WISCONSIN; CITY OF RACINE, WISCONSIN; CITY OF SOUTH MILWAUKEE, WISCONSIN; THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants.

Case No. 72-C-1253

JUDGMENT ORDER

This cause having come on trial before this Court, and the Court having heard the witnesses and having examined the exhibits admitted into evidence, and the Court having heard the legal arguments for the parties, and the Court, on July 29, 1977, from the bench having announced its "FINDINGS OF FACT AND CONCLUSIONS OF LAW."

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants CITY OF MILWAUKEE, SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE and each of them and their agents, employees or successors in

interest are hereby permanently enjoined from emitting sewage discharges, from the respective sewer pipes or structures owned or maintained by the defendants, into Lake Michigan or any of its tributary waters, except as hereinafter permitted in this order and said defendants are hereby ordered to:

(1) The respective defendants shall in their respective jurisdictions eliminate all sewage overflows emanating from sewer pipes or structures owned, operated or maintained by the defendants located outside of the area which was designated by the defendants at trial as the Combined Sewer System Area hereinafter ("CSO"). Elimination of such overflows shall be completed on or before July 1, 1986. For purposes of this order an overflow is defined as a crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment according to the treatment methods and effluent limits set forth in paragraph (3) below. If, in defendants' opinion, completion by such date becomes impossible due to circumstances beyond defendants' control, then defendant(s) may apply to the Court for an extension of time for completion. Any such application, if opposed by either plaintiff, must be predicated on an evidentiary hearing preceeded by adequate opportunity for discovery by plaintiffs. Defendant shall be required to prove the basis for and the necessity for such extension which extension shall be granted or denied in the sound discretion of the Court. Defendants shall pay plaintiff(s)' entire costs of any such application including reasonable attorneys' and experts' fees, and

the costs of discovery, preparation and presentation of their position.

(2) The Commission defendants shall in three stages, the first to be completed on or before December 31, 1985; the second on or before December 31, 1987; and the third on or before December 31, 1989, put into operation a collection, and conveyance system in the combined sewer system area ("CSO") which shall collect and convey all human fecal waste entering the sewers in the combined sewer system area. The first stage of such system shall have storage capacity of not less than 700 acre feet, the second not less than an additional 1290 acre feet, and at the completion of the third stage (December 31, 1989) the entire system shall have storage capactiy of not less than 2605 acre feet and shall be designed and operated within such storage capacity so as to collect, convey and store the volume of flow and all human fecal waste capable of transmission by the combined sewer system. Defendants have analyzed rainfall events experienced during the period 1940 through the date hereof (which is the period for which detailed hourly rainfall data is available) and have represented to this Court that their analysis demonstrates that at a storage capacity of 2605 acre feet, there would have been no overflow from such a system. All fecal wastes and flows collected and conveyed from the combined sewer area shall be treated according to the treatment methods and to the effluent limits set forth in paragraph (3) below,

Overflows, if any, which do occur shall constitute a violation of this order unless defendants can prove as a defense to a charge of violation either:

(1) that the overflow resulted from runoff conditions which exceeded the capacity of the 2605 acre feet of storage at a pump out rate to advanced treatment of 110 CFS; and that the runoff events which resulted in the overflow would have caused an overflow in excess of the design capacity of the 2605 acre feet storage system at 110 CFS under the identical scientific premises and calculations used by the defendants prior to the date of this order to design the size of such storage system; or in the case of overflows resulting from causes other than excess runoff events,

(2) that the overflow was wholly caused by actions or occurrences wholly outside the control of the defendants and was in no way caused or contributed to by the negligence of the defendants.

Any defense to an overflow violation shall be predicated on an evidentiary hearing preceded by an adequate opportunity for discovery by plaintiffs. Defendants shall bear the evidentiary burden of proof of establishing the defenses listed above, and if the Court finds that the defense has not been proven, shall pay plaintiff(s)' entire costs of opposing any such defense including reasonable attorneys' and experts' fees and the costs of discovery, preparation, and presentation of plaintiffs' position. In any event, any overflows which may conceivably occur shall be subjected to treatment by bar screens, followed by drum screens, followed by chlorination prior to discharge. Should defendants develop information which establishes in defendants' opinion that separation of all

or part of the system is a preferred alternative, which will provide a collection and treatment level equal to or better than that required herein then defendants may apply to the Court for modification of this paragraph to provide therefor. Any such modification, if opposed by either plaintiff, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiffs. Defendants shall bear the evidentiary burden of proof of establishing that such modification equals or exceeds the level of protection provided herein. Defendants shall pay plaintiff(s)' entire costs of any such application including reasonable attorneys' and experts' fees, and the costs of discovery, preparation and presentation of their position.

(3) The Commission defendants or their successors in interest shall from and after December 31, 1985 treat all human fecal wastes which reach existing, expanded, or newly constructed treatment plants owned, operated or maintained by the defendants by means of appropriate secondary treatment facilities to be followed by treatment with chemical coagulation, sedimentation, and sand or multi-media filtration which facilities shall as of December 31, 1986 and thereafter produce an effluent which does not exceed five (5) milligrams per liter (mg/l) suspended solids and five (5) milligrams per liter of five (5)-day carbonaceous biochemical oxygen demand (BOD_5). From and after December 31, 1986, there shall be no by-pass at any existing, expanded or newly constructed treatment plant. The effluent requirements shall be calculated on the basis of daily composite samples averaged on a 30 day consecutive basis, provided that the maximum effluent concentration discharged on any given day shall not exceed ten (10) milligrams per liter suspended solids and ten (10) milligrams per liter car-

bonaceous BOD_5. The effluent shall be treated with chlorine, so as to achieve a free chlorine residual as measured by the amperometric test after 15 minutes residence time. If defendants conclude that some other disinfectant chemical or procedure will provide a level of protection equivalent to such chlorine treatment and is preferable, defendants may apply to the Court for a modification of this paragraph (3) to permit the use of such other disinfectant chemical or procedure. Any such modification, if opposed by either plaintiff, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiffs. Defendants shall bear the evidentiary burden of proof of establishing that the proposed modification will provide a level of protection equivalant to such chlorine treatment.

Maximum fecal coliform counts on any one grab sample shall not exceed 40 fecal coliform per one hundred (100) milliliters. Phosphorous (P) concentrations shall be no more than one (1) miligram per liter based on a monthly average.

(4) Plaintiffs have emphasized their concern to maintain a detailed understanding of defendants' progress in designing and constructing the facilities ordered by the Court. Defendants have agreed to and shall allow plaintiffs, during working hours and upon reasonable notice, to conduct a continuing engineering audit of defendants' progress in complying with this order and have agreed to permit plaintiffs (and persons designated by plaintiffs) complete access to all planning, testing, design and construction or operational work or materials prepared by defendants or their consultants. Defendants have also agreed to and shall promptly pay the reasonable charges or fees of persons designated by plaintiffs to conduct such

continuing engineering audit provided that such engineering audit activities to be paid by defendants shall not exceed 50 man days per calendar year; and any of such required payments accrued or made during the course of appeal shall be and remain the obligation of defendants regardless of the outcome of any appeal.

(5) During the periods necessary to complete the facilities required for compliance with the provisions of this order, as set forth above, the defendants shall be permitted, on the basis of using the best engineering practices available within the limits of the capabilities of those facilities, to continue the operations of their respective sewage collection, treatment and discharge facilities as the same may be modified from time to time to comply with the requirements of this order. Existing disinfectant systems shall be maintained and operated in such periods and no new by-passes or overflows shall be installed or operated during such periods except that prior to December 31, 1986 *and not thereafter,* a by-pass may be installed and operated if required as a protective device to protect the South Shore Plant and then only if triggered at and operated during the existence of a flow rate equal to or greater than the plant flow capacity (260 to 316 mgd) for flow in excess of such capacity. In the event that plaintiff(s) challenge any overflow as being in violation of the provisions of this order for the reason that such overflow was not triggered by and limited to flows in excess of plant capacity, it shall be the burden of the defendants to prove in an evidentiary hearing preceded by adequate discovery by plaintiff(s) that such overflow was triggered by and limited to flows in excess of plant capacity. If the Court finds that the defense has not been proven, defendant(s) shall pay plaintiff(s)' entire costs of opposing any such defense includ-

ing reasonable attorneys' and experts' fees and the costs of discovery, preparation, and presentation of plaintiffs' position.

As set forth in paragraph (3) above, all by-passes shall be eliminated by December 31, 1986. If one or more additional temporary overflows become necessary in defendants' opinion in the defendant City of Milwaukee's system for operation to protect the public health prior to December 31, 1986, then defendants may apply to the Court for a modification of this paragraph 6 to permit operation of such additional overflows up to but not after December 31, 1986. All such overflows shall be eliminated by December 31, 1986. Any such modification, if opposed by plaintiffs, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiff(s). Defendants shall bear the evidentiary burden of proof establishing the public health requirements for such modification which shall be founded in such public health requirements as, but not limited only to, preventing the backing-up of sewage in basements. Defendants shall pay plaintiff(s)' entire costs of any such application including reasonable attorneys' and experts' fees and the costs of discovery, preparation and presentation of their position. Nothing herein shall relieve defendants or any of them from compliance with other applicable discharge standards.

(6) As a joint and several responsibility, defendants shall pay immediately to plaintiffs the amount of $230,000.00, in the manner directed by plaintiffs, as costs of these proceedings, in lieu of following normal procedures to tax costs by the Clerk of this Court. Such sum in total shall be returned to defendants in the event judgment is reversed in toto; in no event shall defendants question the individual items or dollar amounts within such total.

(7) All burdens of proof set forth as requirements of this Judgment Order shall be met by a standard of a preponderance of the evidence.

(8) The Court hereby approves and orders the defendants to adhere to the schedules set forth in Exhibits 1 and 2 attached hereto for compliance with this Judgment Order. If defendants apply to the Court for modification of any component of the time schedules herein, such modification, if opposed by plaintiffs or either of them, must be predicated on an evidentiary hearing preceeded by adequate opportunity for discovery by plaintiffs. Defendants shall bear the burden of proof that such modification is required by causes wholly outside the control of the defendants or their agents, consultants or employees, and was in no way caused or contributed to by the negligence of the defendants or their agents, consultants or employees. The granting or denial of any such application shall be in the sound discretion of the Court.

(9) The Court hereby expressly reserves jurisdiction over the parties hereto and over the subject matter hereof to enforce the provisions of this Judgment Order.

Entered: November 15, 1977

John F. Grady

United States District Judge

CH2M HILL

EXHIBIT 1
MMSD FACILITY PLANNING SCHEDULE 1.1.7.2

App. 10 - App. 11

11 NOV., 1977

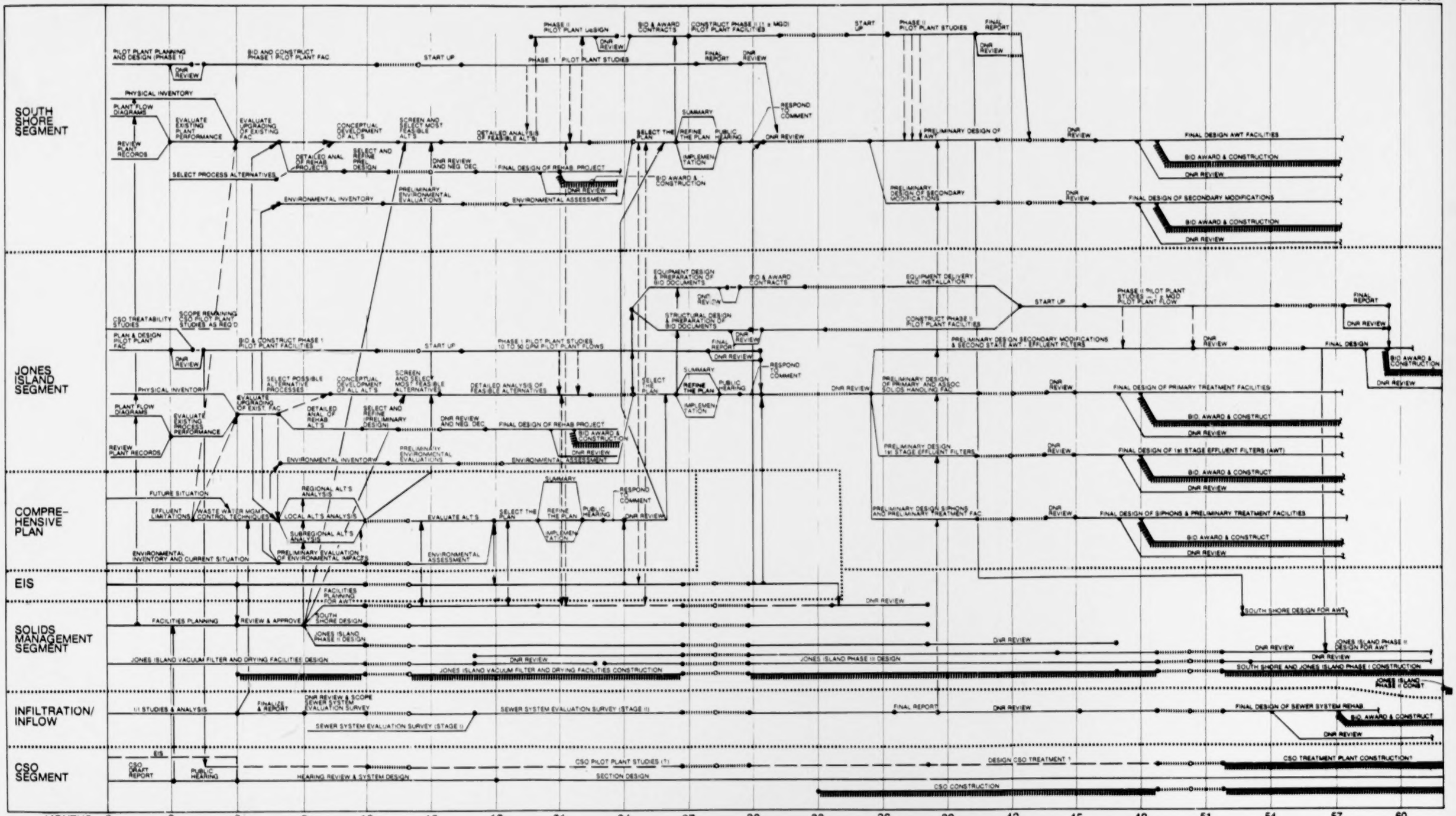

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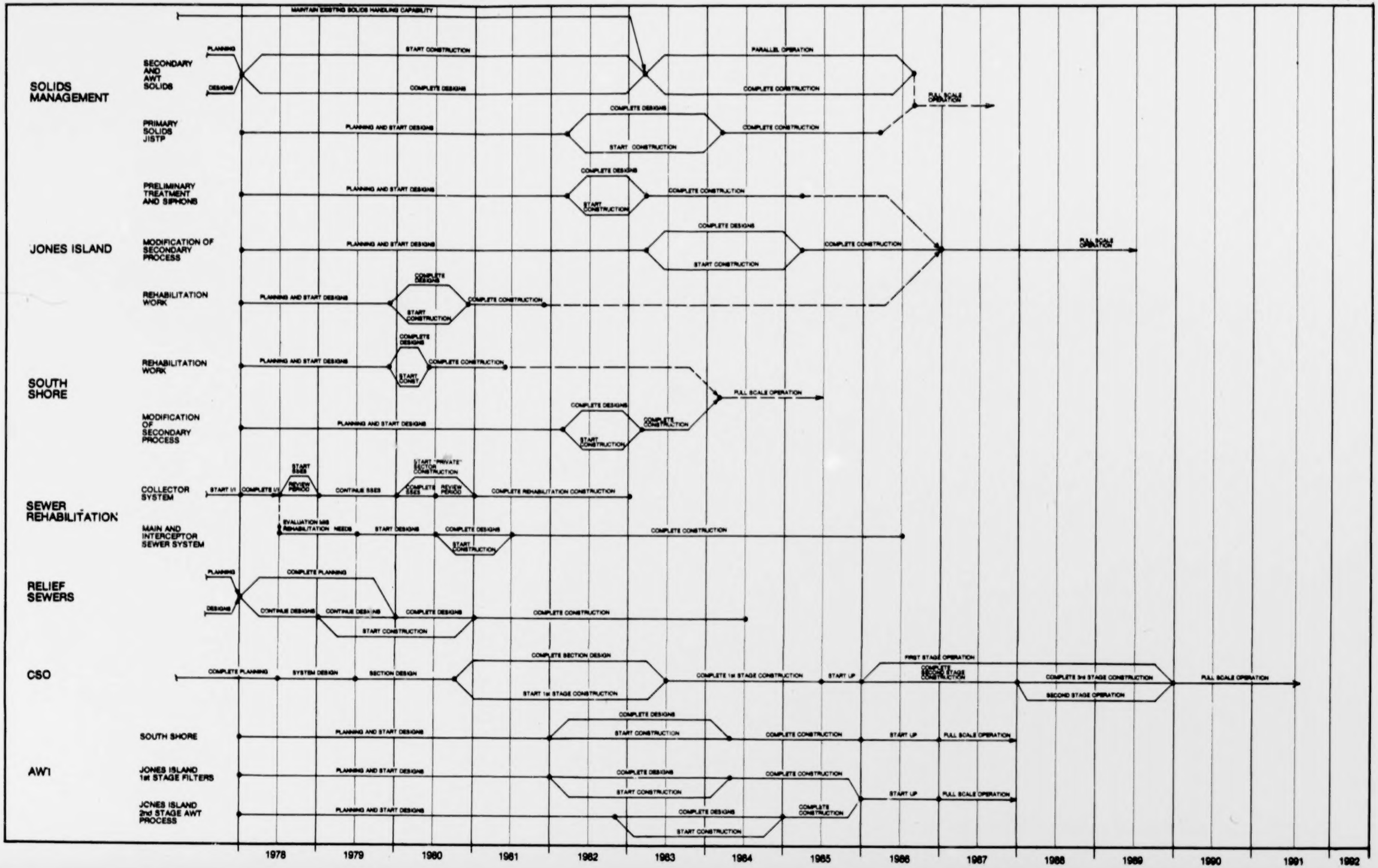
EXHIBIT 2
MMSD PROGRAM SCHEDULE 1.1.7.2

11 NOV., 1977



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PEOPLE OF THE STATE OF ILLINOIS, ex rel., WILLIAM J. SCOTT, Attorney General of the State of Illinois, Plaintiff, PEOPLE OF THE STATE OF MICHIGAN, v. CITY OF MILWAUKEE, WISCONSIN; CITY OF KENOSHA, WISCONSIN; CITY OF RACINE, WISCONSIN; CITY OF SOUTH MILWAUKEE, WISCONSIN; THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, Defendants.	Case No. 72-C-1253

STIPULATION

It is hereby stipulated by and between the parties hereto that the relief necessary to achieve the effluent quality required by the decisions of this court heretofore rendered herein is set forth in the proposed Judgment Order, copy of which is attached.

This stipulation is entered into for the purpose of presenting to the court the specific engineering solutions, with scheduling and effluent standards, required to carry out the general Findings and Conclusions and the general requirements which this court has imposed on the defendants herein in such decisions. Its submission is made to avoid the necessity of adducing extensive expert testimony before the court directed to the same purpose.

The parties agree to be precluded from asserting on appeal any challenge to the engineering feasibility (or to the engineering feasibility of the time schedules for installation) of the transport, collection and treatment facilities and the engineering feasibility of accomplishing the effluent standards set forth in the attached form of Judgment Order.

The parties also agree to be precluded from asserting on appeal any challenge to the engineering audit charges set forth in paragraph (5) of the attached form of Judgment Order and to be precluded from asserting on appeal any challenge to the payments of the trial costs set forth in paragraph (7) of the attached form of Judgment Order. The trial costs set forth in paragraph (7) shall be returned to defendants if Judgment is reversed in toto. The parties also agree to be precluded from asserting on appeal any challenge to the evidentiary burdens and future cost payments imposed by the attached order.

Other than as set out above, this stipulation is entered into without prejudice to the rights of any of the defendants to appeal from the ultimate judgment entered herein upon any and all grounds including without limitation: challenges to the jurisdiction of the court; assignments of error in the determinations of liability and of each and every element thereof; assertions that error has been committed in establishing the various levels of relief in the prior decisions herein; assertions that the findings are not supported by the evidence; and, assertions that the conclusions are not supported by the findings or the evidence.

Upon the foregoing understandings, agreements and stipulations it is further stipulated that a Judgment Order in the form attached may be entered upon motion of

any party without further notice than this stipulation, it being expressly understood that defendants hereby agree to make the payments required by said proposed Judgment Order in accordance with the terms thereof when and if such proposed Judgment Order is entered by the court.

Nothing in this stipulation precludes any party from appealing the results of any future evidentiary hearing provided for in the attached Judgment Order on any grounds which are then appealable.

Date November 14, 1977

PEOPLE OF THE STATE OF ILLINOIS, ex. rel., WILLIAM J. SCOTT, Attorney General of the State of Illinois,
by William J. Scott
Its Attorney

PEOPLE OF THE STATE OF MICHIGAN
by Thomas J. Emery
Its Attorney

CITY OF MILWAUKEE, WISCONSIN
by Michael J. McCabe
Its Attorney

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE
by Richard W. Cutler
Its Attorney

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE
by Richard W. Cutler
Its Attorney

[Tr. 14206]

PEOPLE OF THE STATE OF ILLINOIS, etc., et al.,
Plaintiffs,
vs.
CITY OF MILWAUKEE, etc., et al.,
Defendants.
No. 72 C 1253

BEFORE: The Honorable JOHN F. GRADY, Judge.

Friday, July 29, 1977

10:00 a.m.

Parties met pursuant to adjournment.

PRESENT:

MR. KARAGANIS
MR. GAIL
MR. EMERY
MR. SCOTT
MR. MOERKE
MR. MOAKE
MR. MC CABE
MR. H. PITTS
MR. MELIN

[Tr. 14207] THE CLERK: 72 C 1253, People of the State of Illinois, ex rel. William J. Scott, Attorney General of the State of Illinois, et al., v. The City of Milwaukee, Wisconsin, et al.

THE COURT: Good morning.

MR. MOERKE: Good morning.

MR. MC CABE: Good morning.

MR. KARAGANIS: Good morning, your Honor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: I would like to make some preliminary observations on two points of law which are pertinent to the way the court looks at the facts of the case.

I believe that I have jurisdiction to try all three causes of action that are asserted in the complaint. The United States Supreme Court in the case of *Illinois v. Milwaukee,* 406 U.S. 91 (1972), indicated that this is a case to be tried under the federal common law of nuisance, but it did not indicate that pendent jurisdiction to try the state claims would be inappropriate. I have concluded that the case should be decided under the principles of the federal common law of nuisance, but I further believe that the elements required under that cause of action are also the same elements which the court would have to find under the two state claims. [Tr. 14208] Therefore, in my view, it makes no practical difference that the court is taking the case on all three counts.

The second legal question of preliminary significance is the matter of the burden of proof. What is the standard to be applied? There are the cases which indicate that in controversies between sovereign states, principles of comity require clear and convincing evidence before the right of any state is circumscribed at the instance of another state. And the Supreme Court did not indicate in the case of *Illinois v. Milwaukee* that this was not a case between states. Indeed, by saying that it did have original jurisdiction to try the case concurrent with the jurisdiction of the district court it seems to me that the Supreme Court implied that this is a suit involving different states. Yet the Court did not say that expressly.

I do not believe that it is a suit between states. It would seem to me anomalous to say that the municipalities and agencies that are involved as defendants in this case are the same as the State of Wisconsin when the fact is that the State of Wisconsin has sued these same municipalities and agencies about subject matter closely related to the subject matter before me. The State of Wisconsin has sued these defendants about the [Tr. 14209] matter of sewage disposal. If the proposition that one cannot sue oneself is as self-evident to you as it is to me, you may agree with me that the State of Wisconsin, at least for purposes of this case, is not the same as the defendants.

I believe that the preponderance of the evidence is probably the standard of proof that is appropriate for this case. Here again, however, due to the way I view the evidence, there is no practical difference in the result I reach, regardless of which standard of proof I employ.

Turning now to the facts of the case, I note that some of the salient ones are not disputed between the parties. For instance, it is not disputed that parcels of water from the Milwaukee area do travel past the state line to the south and do transport materials from the Milwaukee area to the State of Illinois. As another example of an important fact that is not in dispute, the defendants and the plaintiffs agree that sewage overflows and discharges of raw sewage into the lake are undesirable.

There are more facts, however, that are in dispute than are agreed upon, and the nature of the factual dispute is such that I have found it necessary to rely upon expert witnesses to a far greater degree [Tr. 14210] than is normally required in an ordinary lawsuit and even in the typical suit involving matters of science and technology.

Ordinarily, when the trier of fact weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.

The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem.

What I have had to do, though, because of the problem, is to rely to a very large extent upon [Tr. 14211] expert witnesses whose credibility impressed me favorably. Both sides have produced in this case expert witnesses whose credentials were impressive, if not overwhelming. Very little effort has been spared by either side to present witnesses who were knowledgeable in the numerous areas of science and technology that are involved in this case.

I think all of these witnesses are interested in the outcome of this case. None of them is neutral as between the parties in this case or as to the hoped for outcome of the case. This is not surprising. These people devote their lives to a study of the questions which confront us here. In doing that, they necessarily come to conclusions and reach points of view and become members of schools of

thought on subjects pertinent to this inquiry. That, standing alone, does not make the witness biased in any invidious sense. I have found some witnesses in this case who, despite their obvious commitment to particular points of view, were in my opinion honest, forthright, reasonably objective and who, in my opinion, made a genuine effort to be helpful to me in the resolution of these difficult problems.

I am going to make some comments about some of the witnesses during the course of my remarks [Tr. 14212] today because I believe it will be helpful to the parties in understanding the basis for my decision, and helpful to the reviewing courts in passing upon the validity of the decision I make, to know what I thought of the witnesses. I have re-read some of the testimony since I saw you last. I thought about someone approaching that task for the first time, without having seen the witnesses, observed their demeanor, seen the interaction between the witnesses and counsel, the interaction between the witnesses and the court, and sometimes even the interaction of the witnesses between themselves in the courtroom. Without the benefit of all those observations, it seems to me that it will be a very difficult task for a newcomer to the case to have the kind of grasp he would like of the probable credibility of the various witnesses. And, therefore, to assist anyone who does read this record, at least to the extent of letting him know what I thought, I am going to make some observations; and I do it for that reason only and not to be unkind or to denigrate anyone unnecessarily.

There were four witnesses in the case who I thought were outstanding. They were outstanding in the sense that they were the best of a number of good witnesses. These were the witnesses Geldreich, Tierney, Wellings

and [Tr. 14213] Culp. There was another group of witnesses I felt as almost equally helpful to the court and of very high caliber, both in terms of their competence and in terms of their credibility. Those were the witnesses Carter, Cliver, Katz, Berg, and Mack.

The limnologists were in a class by themselves. It was perhaps accidental but nonetheless significant that they were even treated as a separate class in that they were permitted to sit through the testimony of other witnesses. The limnological testimony was the least conclusive, the least satisfying, the least convincing of any of the testimony in the case. This is no reflection upon the witnesses who gave it but rather a statement describing the state of the art. What we do not know about what goes on in Lake Michigan far exceeds what we do know, and all of these persons readily acknowledged that. The limnologist whom I found most helpful, and upon whom I rely with the greatest feeling of comfort is Dr. Schelske.

There were some witnesses I felt were biased in the undesirable connotations of that term. These witnesses were biased either because they have a personal commitment to one of the parties in the case or because of their devotion to a particular point of view. Some of [Tr. 14214] these witnesses were combative and unwilling to concede points on cross examination which they should have conceded because they were so obvious. They were on occasion evasive and doctrinaire. These were the witnesses Verber, Zanoni, Pritchard, Fitzgerald, Sproul and Gutpa.

The case breaks down into two principal subject matter areas. The first is the matter of public health, and I will address myself to that now.

The defendants in this case discharge disease-causing bacteria and viruses to Lake Michigan in two ways. First is the raw sewage which is discharged to Lake Michigan during wet weather periods through devices known as overflows, by-passes and cross-overs from the sanitary sewer system to the storm sewer system.

The second way in which these pathogens are discharged to the lake is in the form of insufficiently treated sewage effluent discharged from the two sewage treatment plants owned and operated by the defendants. The pathogens are in the effluent for several reasons. One reason is that the treatment time is often insufficient, due to overloading of the plants, and there is not sufficient time to settle out the solids in the sewage. These solids interfere with chlorination, so that the chlorine does not reach the pathogens. Even when the [Tr. 14215] plant is not overloaded many of the solids still fail to settle out.

The defendants attempt to conform their effluent to a standard of 30 parts per million of suspended solids and BOD, but they rarely achieve that standard and concede that before they can meet it with any consistency a substantial amount of additional plant renovation and updating will have to be done; but even if a 30/30 standard were met, it is my finding that that standard would still result in the discharge of staggering numbers of pathogens to Lake Michigan.

These pathogens, once they are discharged to the lake, are on occasion transported by the currents to the waters of the State of Illinois. We know this for several reasons. First of all, both sides concede that on a number of occasions throughout the year, there are currents of sufficient persistence in a southerly direction and of a sufficient speed to transport from the Milwaukee area

pathogens which will still be alive when they reach the Illinois state line.

The bacteria live on the order of four to eight days in the water, and there is a phenomenon known as regrowth, which can result in a substantial replacement of bacteria which die by the birth of new bacteria [Tr. 14216] occurring during the southward flow. Viruses, which I regard as the more serious of the two principal types of pathogens with which we are concerned, live for a week and a half or two weeks in warm water and can live for months in colder water.

There is no doubt that viruses and bacteria have a long enough life span to reach Illinois in the persistent currents which occur a number of times a year. How many times a year this occurs is, of course, impossible to state with any certainty. The plaintiffs' experts estimate something like a dozen times a year. The defendants' experts estimate that it is more like four times a year or possibly even two times a year. But both sides concede that their estimates could be off either on the high side or on the low side.

In addition to the die-off of the pathogens themselves, there is another factor which ameliorates the problem to some extent, and that is the phenomenon of dilution. The water which comes down in a parcel doesn't come down intact in the exact form that it left Milwaukee Harbor. Rather, it dilutes with the other water in the lake.

The experts are in conflict as to the amount of dilution and even as to the proper scientific principle [Tr. 14217] to be applied to determine the amount of dilution. Notwithstanding that dispute -- which I resolve in favor of the plaintiffs on the basis of what I perceive to be the

greater credibility of their witness on the subject — there still is not sufficient dilution to eliminate the viruses and the bacteria from the water which we know arrives in Illinois from Milwaukee on some occasions during the course of the year. There is no reason not to believe that bacteria and viruses numbering literally in the millions are transported live and intact from Milwaukee to Illinois waters.

The defendants produced a considerable amount of testimony designed to show that the matters of which I have just spoken do not in fact occur or at least do not occur on a scale sufficient to constitute a health hazard to the residents of Illinois. An organization known as Envirex conducted certain studies designed to show that the sewage, when it comes out of the Milwaukee River and when it comes out of the treatment plants, is almost immediately diluted to a degree that only insignificant numbers of pathogens and insignificant amounts of other pollutants could reach Illinois waters, if any could reach Illinois waters at all. These were known as the net [Tr. 14218] studies and the shore studies conducted by Envirex.

I attach almost no weight to these studies. They were conducted without adequate information as to the prevailing conditions, so that the results were impossible to interpret. I refer specifically to the fact that these studies designed to show that currents running to the south would not carry materials to the south were conducted by people who did not know which direction the currents were going in at the time they conducted the studies and took their samples. Neither did the persons who conducted the studies know where on the hydrograph and where on the pollutograph they were at the time they conducted their wet weather studies.

Furthermore, to the extent that these studies show an apparent decrease in the number of fecal coliforms contained in the top three feet of the water, they demonstrate nothing about the number of viruses that might have been in that top three feet of the water. The evidence is clear on both sides that you can have zero fecal coliforms and many viruses in the same parcel of water.

Moreover, the number of samples taken was insufficient. And the depth at which the samples were taken was insufficient to reflect the probable counts [Tr. 14219] which might have been found at other levels.

Something which infected those studies from the outset and which perhaps accounts in some degree for the invalid methodology with which they were conducted was the attitude of Dr. Zanoni, who was in charge of them. It is not simply a matter of inference that Dr. Zanoni started with the conclusions that he wished to reach and then fitted the data into those conclusions. It is a matter of his express acknowledgment from the witness stand that that is what he did.

If one were to look for a model of how a scientific study should not be conducted, I would commend him to the record of the Envirex net and shore studies. Dr. Zanoni was unwilling to recognize the slightest suggestion that the conclusions which he had reached were not borne out by his data. I could give many examples. I will give simply one. On his direct examination, he testified that the numbers of fecal coliform found in his samples were consistent with the numbers found by the City of Milwaukee in their samples and that this supported his conclusions. On cross examination it was pointed out to him that just the contrary was the case, that there were rather marked discrepancies between his figures and

those obtained by the City, Dr. Zanoni's [Tr. 14220] response to that was that he did not know whether the sampling methods conducted by the City were valid. They had been valid enough in his mind for him to tell me on direct examination that they confirmed his own findings, but when it appeared that they did not confirm his findings, he suddenly decided that there was something wrong with their sampling technique. When pursued further as to what their sampling technique was, it developed that he had not the slightest idea of what it was and had no reason whatsoever to suspect that there was any deficiency in it. I give this as one example of many that will be found by anyone who reads the record of Dr. Zanoni's testimony.

Another study conducted by Dr. Zanoni and Mr. Carter was the fecal coliform die-off study. To a lesser extent than in the case of the net and shore studies, this particular experiment is inconclusive at best. Again, only the top three feet of the water column were sampled. The number of samples taken was not small. The amount of water sampled was only a fraction of the sample size recommended by standard methods. The die-off line which resulted from the study seems to me to have been put askew by an improper starting point. Finally, as I indicated earlier, the numbers of fecal coliform found in any level of the water column bear no particular [Tr. 14221] relation to the number of viruses that might be found there.

Now, the State of Illinois had an opportunity to conduct its own study of the kind that Envirex conducted. It elected not to do so. In so electing, it is my opinion that the state chose to produce less evidence than it should have. My guess as to why they elected not to conduct their own study is that they were afraid of a negative

result. Conducting such studies is dangerous because, of course, they cut both ways; but if the position of the State of Illinois is correct, as I believe it is, a properly conducted study should have resulted in some circumstantial evidence that would tend to confirm that theory.

The test would have had to be conducted without the infirmities that I have mentioned in regard to the Envirex studies, and that could have been done. In fact, negative results would not have been fatal to the plaintiffs' case.

Once these pathogens arrive in Illinois waters, they can infect and cause disease in residents of Illinois. This takes place in two ways: by ingestion of these waters at bathing beaches by swimmers and by ingestion of drinking water containing these pathogens.

[Tr. 14222] The defendants' answer to this is that in regard to the bathing beaches, the risk is minimal because the numbers of pathogens are small, and that as far as drinking water is concerned, the treatment plants may be relied upon to remove any harmful organisms.

In regard to the bathing beaches, I am satisfied that the persons who use those beaches cannot do so with safety if there are any significant numbers of viruses in the water. There is a question as to how many viruses it takes to cause an infection. I can't solve that one. The experts are not in agreement, but I believe, first of all, from the evidence I have heard, that the number is small. If one virus is insufficient, it still need not be hundreds. Moreover, the evidence shows that any viruses which do reach Illinois waters are likely to do so in great numbers.

There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee, but again, that does not prove that viruses are not in the water.

As far as the treatment plants are concerned, the testimony of Dr. Wellings convinces me that viruses do get through water filtration plants attached to and embedded in solids, which can go through the filters of [Tr. 14223] those plants, both when the plant is being operated properly and even more so should the plant experience a breakdown.

The defendants submitted evidence that there is a substantial diminution of the number of viruses which enter a sewage treatment plant before the effluent is discharged into the lake. There is no question that that is so. I think, however, that the primary factor which accounts for that is sedimentation. I do not believe from the evidence that there is any bacteriological kill of the viruses in the activated sludge process. I feel that Dr. Sproul's conclusions in that regard were based upon insufficient information. I agree with Dr. Wellings' analysis of the Moore study on that subject.

Despite the large percentage of viruses which are deactivated and removed in the process of sewage treatment, there is no question that large numbers of them do get through and are discharged to the lake because of the insufficient treatment of the solids in the effluent. I am satisfied from the testimony of Dr. Wellings and other witnesses in the case that unless there is a good removal of solids and a free chlorine residual, there is not an adequate kill of viruses. There is evidence in the record on both sides of the case which I find convincing [Tr. 14224] on that point. The defendants never have a free chlorine residual by the amperometric test, which I find from the evidence is the more valid of the two methods of measuring a chlorine residual.

The defendants also argue that there is no evidence of any outbreak of water related diseases in Illinois, and this is true. However, I am persuaded by the expert testimony that the diseases caused by the pathogens in sewage are mostly of the kind, if not all of the kind, that are not likely to be reported, and if reported, are not likely to be diagnosed as a viral disease or even as a bacteriological disease related to water.

The expense and the time and the effort involved in identifying and isolating a virus which may have caused an infection in an individual who does present himself for medical treatment is so great that the effort is rarely undertaken. Therefore, I find that the absence of any reported outbreak of enteroviral diseases or of shigellosis or salmonellosis, or any of the other bacterial diseases, does not demonstrate that such diseases are not being contracted by residents of Illinois by reason of their exposure to waters of Lake Michigan which contain pathogens.

[Tr. 14225] The diseases that are water-borne are generally not fatal diseases, but they are debilitating diseases. They are serious enough to be deemed a genuine health hazard and a legal nuisance. This is a value judgment, and perhaps someone else may feel that the symptoms of hepatitis and encephalitis and the other diseases shown by the record are not sufficient to constitute a nuisance. But that will be for someone else to say.

I feel that exposure to such diseases does warrant a legal remedy. The hazard is immediate, in that it is existing now. It existed yesterday. It will exist tomorrow. The defendants argue with considerable force that the mere possibility that an Illinois resident will contract a water-borne disease is insufficient to warrant the relief

sought by the plaintiffs. They ask for the evidence of the actual outbreak of disease, the actual incidence of stomach aches and diarrhea and various symtoms which one might expect to find.

There are two problems with that approach. The first is that it is impossible to demonstrate that any particular disease contracted by any particular individual was contracted as a result of drinking water contaminated by reason of Milwaukee's sewage. If the [Tr. 14226] defendants want that kind of evidence, as they do, they will never receive it. It is impossible to produce.

The second problem with that approach is that it ignores the fact that exposure to a hazard, whether or not that exposure results in the actual contraction of a disease, is itself actionable. On the virtually undisputed evidence in this case, there is some degree of hazard to the residents of Illinois from Milwaukee's sewage. It is the degree of that hazard which is in dispute. Prevention is what public health is all about. Prevention is what equitable relief is all about, and it is not necessary to wait until an actual outbreak occurs to do something to prevent it. If you wait until it occurs, then, at least to that particular injury, you have waited too long.

There are some expressions in some of the cases which I think are pertinent, and I would like to read briefly from the case of *Missouri v. Illinois,* 180 U.S. 208, at pages 242 and 244. This case had to do with an effort by the State of Missouri to enjoin the City of Chicago from discharging its sewage to the river system and thereby allegedly polluting the Mississippi River. The position of the State of Illinois at this juncture of that particular litigation was that there had been [Tr. 14227] no

showing of any harm as yet, and the Supreme Court of the United States said:

> "In the first place, it is urged that the drawing by artificial means, of the sewage of the City of Chicago into the Mississippi River may or may not become a nuisance to the inhabitants, cities and towns of Missouri; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be inflicted. Can it be gravely contended that there are no preventative remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?"
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> * * * *
>
> "The nature of equitable remedy in the case of public nuisances was well described by Mr. Justice Harlan speaking for the court in the case of *Mugler v. Kansas,* 123 U.S. 623, 673: 'The grounds of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable [Tr. 14228] mischief ensues, but arrest or abate those in progress and by perpetual injunction protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community.' "

Another case which is pertinent to this point is the case of *Harris Stanley Coal and Land Company v. Chesapeake and Ohio Railway Company,* 154 F.2d 450, a case decided by the Court of Appeals for the Sixth Circuit. The court said at page 454:

> "Though no injury had yet been shown to have been incurred by the railroad, possible future injuries may be enjoined. . . (citations omitted) and suits are not premature because the plaintiff does not await an actual test of the results of a proposed or threatened act."

It seems to me that in some of the arguments the defendants have presented in this case, they have confused two things. One is the elements of the cause of action which the plaintiffs must prove, and the other is the standard of proof by which those elements must be [Tr. 14229]proved. The defendants contend that the evidence must be clear and convincing. I am adopting that view for purposes of this case. The second question is: What must the clear and convincing evidence show? The defendants take the view that because the evidence must be clear and convincing, it must show an actual injury. Otherwise, it is not clear and convincing. It is my view and my understanding of the law that what the plaintiffs must show by clear and convincing evidence is the existence of a hazard, whether or not that hazard has in fact eventuated in an injury. The hazard itself is the injury justifying injunctive relief in this kind of case.

I find from what I regard as clear and convincing evidence that the discharge of sewage by the defendants into Lake Michigan constitutes a health hazard of serious magnitude to the residents of the State of Illinois and

that, unless enjoined by this court, that danger will continue to exist.

I turn now to the second phase of the case, that involving the matter of accelerated eutrophication of Lake Michigan.

I have no doubt whatever from the evidence in this case that the amount of phosphorus in Lake Michigan [Tr. 14230] is increasing. No one knows how much phosphorus was in the lake 20 years ago, nobody knows how much phosphorus was in the lake yesterday; but what is clear from the evidence beyond any doubt is that when phosphorus is put into the lake, it stays there for a long time. It stays there either in solution in the water itself or in the bio-mass — the algae, the organisms, both animal and vegetable, which use phosphorus in their life cycles — or it is in the bottom sediments, from which it can be recycled, that is, put back into solution over time.

A lot of numbers were testified to in this case. I think the one that was the most impressive to me was the number 100. It takes 100 years for Lake Michigan to empty itself into Lake Huron. It is literally a cul-de-sac which can be victimized by mistreatment in a manner that other lakes and water courses of greater defensive capability cannot be victimized.

Lake Erie, which is considered by all to be a polluted lake, at least in its western basin, renews itself in three years, because it is a shallow lake and a much smaller lake than Lake Michigan. Yet, we have seen that in the lifetime of most of the people in this room, Lake Erie has gone from a lake that was [Tr. 14231] described as oligotrophic to one that is considered eutrophic and a source of serious concern to the persons who depend upon it.

I find that as a result of the inputs of phosphorus and other nutrients to Lake Michigan, the lake is undergoing accelerated eutrophication. Accelerated eutrophication is that eutrophication which is caused by man, as opposed to the eutrophication which occurs inevitably and naturally.

The evidence of the accelerated eutrophication is the decrease in dissolved silica, which I find is due to its utilization by diatoms; a decrease in the diatom population; and an increase in blue-green algae, both in the in-shore zone and the off-shore zone.

Dr. Shapiro's theory that the problem is caused or that the manifestations I have referred to, if they exist at all, are caused by alewives rather than by phosphorus, is, I think, a less likely and less reasonable explanation. I agree with Dr. Schelske that the more logical and natural explanation is that the phosphorus inputs from both point and non-point sources have caused these phenomena.

Accelerated eutrophication results in taste and odor problems in the lake water. In an [Tr. 14232] advanced state, this odor problem can affect the use of the water for recreational purposes, and even in a less advanced stage, it can cause problems with drinking water. I was impressed by the fact that the City of Green Bay, Wisconsin, which is located right on Green Bay, does not get its drinking water from Green Bay. Instead, it goes clear across the Door Peninsula, a distance of 50 miles or more, and brings its drinking water from Lake Michigan. The reason, of course, is that Green Bay, a large embayment of the lake, does not offer drinking water of the quality desired by the residents of that city.

The reason it does not is that the southern portion of Green Bay has undergone accelerated eutrophication and is a eutrophic part of the lake.

In addition to the odor and taste problems caused by eutrophication, there is a loss of the clarity of the water, which is an aesthetic value important to many people, and I think rightly so. A secchi disc in Lake Superior can be seen at a depth of 60 feet. In Lake Michigan it can be seen at a depth of 10 to 15 feet only. Lake Superior is an ologotrophic lake. Lake Michigan is becoming a lake which exhibits the turbidity typical of lakes inhabited by increasing populations of algae.

[Tr. 14233] The accelerated eutrophication caused by these nutrient inputs is far greater in the in-shore zone than it is in the off-shore zone, but there is no reason to believe that the eutrophication found in the in-shore zone will not spread, and, if not stopped, that it will not spread clear across the lake. That is the way it happened in Lake Erie. The in-shore zones began to exhibit manifestations of eutrophication. The confident predictions of various experts that the problem would remain there were not borne out by what actually occurred.

Lake Michigan, of course, is a bigger lake and a deeper lake. But I have heard nothing in this evidence to persuade me that there is any reason to believe that the same process will not occur in Lake Michigan, except it will take longer.

I find that the waters of Lake Michigan within the territorial boundaries of the State of Illinois are undergoing a process of accelerated eutrophication at the present time and that this process is caused by nutrient inputs, some of which emanate from the defendants. As has been

pointed out by everyone in this case, there is no method of identifying any particular molecule of phosphorus or nitrogen or any other chemical as having [Tr. 14234] come from a particular location. But because the waters of the in-shore zone interchange with each other and do mix longitudinally along the shore, it is a fact, both inferrable circumstantially and deducible as a matter of logic, that all inputs of nutrients along the western shore contribute to the accelerated eutrophication of the entire western shore line.

The benthic studies do not persuade me of anything either way. Dr. Otto was frank enough to admit that their purpose was not to demonstrate the absence of any long-term eutrophication process. But neither did those studies convince me that there are not perceptible short-term changes.

The Fitzgerald cladophora study was effectively rebutted by the testimony of the witness Renz. In fact, I felt that the testimony of Dr. Fitzgerald, when viewed in the light of those jars of cladophora that Mr. Renz was able to collect with no effort, was misleading, to say the least.

Because of the interchange of water between the in-shore zone and the off-shore zone and the eventual mixing of the entire lake, the State of Michigan is exposed to injury and is being injured by the discharges [Tr. 14235] of nutrients by these defendants.

There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake. It does not appear to me that the plaintiffs attempted to adduce such evidence. The matter was simply adverted to in passing from time to time, but the evidence was insuffi-

cient to prove that the disappearance of the whitefish or the lake trout or any of the fish species which are in trouble in Lake Michigan is caused by nutrient inputs. There is, however, evidence in the record from both sides that in-shore eutrophication is very likely to cause eventual problems with the spawning grounds of most of the types of fish which inhabit the lake. Therefore, in that sense I think that the matter of in-shore eutrophication is relevant to the question of fish, not presently, but in terms of a danger which definitely exists for the future.

There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee's sewage as opposed to the nutrients discharged by any other point or non-point source. This, indeed, is the nature of this problem. [Tr. 14236] It is not possible to segment nutrient inputs and ascribe this part to one source and another part to another source. All point and non-point sources combine to create the totality of nutrient inputs to the lake.

This case has to be looked at in a temporal way differently than the ordinary nuisance case is looked at. Some of the problems we may have in analyzing the facts of this case and applying the law to those facts arise from the difficulty of analogizing the situation involved here to the more typical nuisance situation. In this case we are concerned with an injury which is occurring in very small parts over a long period of time, a time not measurable by any specific finite event. It is measured in decades if not in centuries and if not in geologic time. Lake Michigan is a resource that will be relied upon by the people who reside in its basin for all time to come —

for as long as this planet is inhabited by human beings — and, therefore, the parameters of a nuisance in regard to that lake must have a temporal aspect consistent with that long term human need for the use of that lake.

We have given some attention to the nature of the defendants in this case as being municipal [Tr. 14237] corporations possibly identical with the sovereign state of Wisconsin. I think the nature of the plaintiffs is something that we should consider as well. This is not an individual plaintiff suing on behalf of himself or even representing a presently existing class. The plaintiffs here are states who represent people who are now living and generations to come, and those generations to come have interests which are every bit as important as the interests of those of us who are alive today. This is not simply an expression of a matter of philosophy. I believe it to be a statement of the law.

The defendants have frequently asked questions of witnesses couched in terms of whether there is any "measurable" effect on the lake caused by Milwaukee's discharges, or whether, if Milwaukee's discharges were altogether discontinued, there would be any "measurable" diminution in the amount of nutrients in the lake. The question really answers itself. It is impossible to measure accurately. It is possible only to estimate, and sometimes the estimates are not based upon empirical data but are really a kind of logical or mathematical analysis; but the fact that inputs are not measurable or the outtakes, if you will, would not be measurable in terms of their effect, does not mean that the effects [Tr. 14238] do not exist, any more than the absence of someone to hear a tree fall in the forest means that it does not make a sound when it falls.

The defendants argue seriously and I believe sincerely that their discharges to the lake must be viewed in terms of the total discharges to the lake, both point and non-point, and that it is unfair to single them out, as they think has occurred in this case.

There was evidence produced as to the loadings to the lake. It was hardly satisfactory. The testimony of Dr. Zanoni as to point and non-point loadings I regard as altogether speculative and unreliable. He relied upon documents which, as it turned out, he had not even read, and when those documents were analyzed on their own merits, they turned out to have serious deficiencies. I give no credence to the Envirex material in regard to nutrient loadings to the lake. I think the Schelske estimate, while obviously subject to a great possibility of error either way, is nonetheless a more reliable kind of approach to the problem.

In any event, I believe that one million pounds of phosphorus from the treatment plants alone, without considering additional phosphorus discharged by the overflows, is a significant input to the lake, and [Tr. 14239] its removal would be a significant removal. We know that Milwaukee is the biggest point source on the lake and that, of the total point sources on the lake, the Milwaukee discharges constitute a substantial percentage.

Now, does the fact that we have little or no ability to control non-point discharges to the lake mean that we ought to ignore the point discharges? I think the answer to that is no. There is a statement contained in the case of *Barrett v. Mount Greenwood Cemetery Association,* 159 Ill. 385, 390, 42 N.E. 891 (1896), which I think is appropriate:

> "But we know of no rule of law that sanctions one wrong because another has preceded it. It is doubt-

> less true that streams of water cannot be kept as pure when flowing through lands occupied by populous communities as when flowing through sparsely settled lands, but these effects that ***unavoidably*** arise from the occupation and cultivation of the soil by man do not justify the ***deliberate*** pollution of the stream of water flowing through another private property, in order that the interests of private persons, or even the public, may be enhanced thereby." (emphasis added.)

There is a second basic fallacy in the [Tr. 14240] defendants' argument, I believe. There can be no doubt that the combined discharges of all point sources contribute substantially to the eutrophication of the lake. If any one point source can defend successfully on the ground that its discharge alone is not causing the problem and that without its discharge the problem would still exist, then that defense must be equally available to all point dischargers. We cannot have one law for Milwaukee and another law for Waukegan, the North Shore Sanitary District, Gary and Muskegon. The law must be uniform, especially since we are dealing with the federal common law of nuisance, which the United States Supreme Court has said is peculiarly adaptable for use in the solution of interstate water problems.

I believe the law is that one discharger who contributes an aliquot of a total combined discharge which causes a problem may be enjoined from continuing his discharge. Either that is true or it is impossible to enjoin point discharges. If Milwaukee is entitled to discharge raw sewage into the lake and insufficiently treated sewage into the lake on the magnitude of 320 million gallons a day or more during wet weather periods, then can any-

one say to Waukegan, Illinois, with a discharge [Tr. 14241] of 10 million gallons a day, that it may not do the same thing? In fact, I have not done the computations, but I would think that 10 million gallons of raw sewage from Waukegan each day would not equal the total nutrient loadings that are going into the lake from Milwaukee's treated effluent. So, if the rule contended for by the defendants were to be the law, it seems to me it would follow that Waukegan would be entitled to discharge raw sewage into Lake Michigan.

I hesitate to make this analogy because there are probably things wrong with it, but it seems to me that in a case of this kind, where one is not dealing with a finite point, either in space or in time, but rather with a continual process affecting a natural body of water the size of Lake Michigan, that the law of nuisance involving numerous polluters is very akin to the law applicable to joint tortfeasors. Each person who contributes to the injury is liable, not for the conduct of anyone else, but for his own conduct in that it forms part of the cause of the total injury.

So both on the basis that I feel the evidence shows Milwaukee's discharges are of themselves a significant cause of pollution to the lake and, secondly, because undeniably its contribution to the total nutrient [Tr. 14242] discharges to the lake cannot be isolated out either factually or legally, I reject Milwaukee's defense based upon lack of measurable contribution.

Viewed in this light, the argument about balancing the equities is really difficult to apply. If the equities are balanced for Milwaukee, then they have to be balanced for everybody. If the equities favor Milwaukee because each dollar of expenditure for better sewage treatment

cannot be shown to result in a specific amount of benefit to the lake, then those same equities favor every other point discharger to the lake.

I suppose there is a minimum level below which a discharge would be de minimis, even though, as a matter of pure logic, all discharges form part of the whole. But we are not dealing with a de minimis situation here. We are not dealing with a level so low that the theory of liability is stretched to its logical extreme.

I find from what I believe is clear and convincing evidence that the defendants' sewage discharges into Lake Michigan are presently contributing in a substantial way to the accelerated eutrophication of the [Tr. 14243] inshore zone of the western shore of Lake Michigan, including waters of Lake Michigan which are within the territorial boundaries of the State of Illinois.

I find further, on the basis of clear and convincing evidence, that due to the interchange of waters in the inshore and off-shore zones, the defendants' discharges, if continued at anything like present levels, will substantially contribute to the accelerated eutrophication of Lake Michigan as a whole, including waters within the territorial boundaries of the States of Illinois and Michigan.

While it might be argued that the deleterious impact of eutrophication is of a far lesser magnitude than the danger presented by pathogens in the water, I believe that the results of eutrophication are serious enough to be an enjoinable nuisance. This is especially true when the countervailing right that is asserted is the right to discharge sewage, and sometimes raw sewage, into Lake Michigan.

I would like to discuss the defendants' argument that the Illinois discharges into Lake Michigan are somehow

a defense to the defendants. First of all, it is a fact that most point sources in Illinois are now out of Lake Michigan. To say that the once-a-year [Tr. 14244] discharge that is contemplated by the Waukegan plant of the North Shore Sanitary District is to be considered in the same light as Milwaukee's discharge of 320 million gallons a day, plus overflows, is not, I think, a valid argument.

The defendants cite the cases of *Missouri v. Illinois* 200 US 496 (1906), and *New York v. New Jersey,* 256 US 296 (1921). Neither of those cases is applicable to the facts we have here. In both of those cases, the evidence showed that the pollution of which plaintiff was complaining already existed by virtue of plaintiff's own activities. The waters which it was seeking to protect were already so polluted by its own discharge that it could truly be said that any activity of the defendants would not add materially to the condition.

In the case of *New York v. New Jersey,* New York was discharging raw sewage from its entire population into New York Bay, a badly polluted body of water, and it was seeking to enjoin the discharge of primary effluent, which had at least received primary treatment, by the State of New Jersey into the same bay. Clearly, that situation is distinguishable from this one where we are dealing with a body of water that is still relatively clean, despite what I have said about the accelerated [Tr. 14245] eutrophication existing in the in-shore and offshore zones. Further degradation is not only a possibility in this case, it is a certainty unless the defendants' discharges are terminated.

Furthermore, this is a nuisance case. Contributory negligence is not involved. Negligence is not involved.

Illinois does discharge effluents to other water courses. We are not dealing with those other water courses. We are dealing with Lake Michigan, and if pollution of the Illinois River and the Mississippi River results from the discharges of Illinois effluent, that is not material to a disposition of this cause dealing with an altogether different body of water. In addition, I note that the discharges which have been referred to primarily in this connection are those of the Metropolitan Sanitary District and the North Shore Sanitary District. These effluents have received advanced treatment, and they are being discharged into water courses which may, for all I know, have different qualities as receiving bodies than does Lake Michigan.

But in any event, I find no conduct on the part of the State of Illinois or the State of Michigan that would in any way estop these plaintiffs from the [Tr. 14246] relief they are seeking against the defendants.

For the foregoing reasons, the court finds the issues on the question of liability in favor of the plaintiffs and against the defendants on all three counts of the complaint.

On the matter of the remedy, the situation has to be analyzed in terms of wet weather flows and dry weather flows, or rather in terms of wet weather flows and all flows.

As far as the wet weather flows are concerned, the witnesses for both sides were in agreement that overflows of raw sewage to Lake Michigan cannot be tolerated and must cease. I find that to be the fact. Whether the defendants agree to it or not, the discharge of raw sewage into the lake must cease.

The defendants have been studying the problem for a long time. I believe that there is little, if any, need for further study on the general proposition of what approach should be taken to the elimination of the overflows. I believe that there has been unnecessary delay on the part of the defendants in addressing the matter of eliminating the overflows, in the combined system, the separate system, the separate municipal areas, and the Metropolitan Interceptor System.

[Tr. 14247] I read much of the material in the Combined Sewer Overflow study, and I find in it no express commitment to the elimination of the overflows. What I find is reference to "control" of the overflows and "reduction" of overflows. It is not altogether clear to me that the Combined Sewer study starts with the proposition that the overflows must be eliminated.

I can save a lot of time, and I am going to save a lot of time in the event any further study of that issue is contemplated, because it will be and it is the ruling of this court that all overflows shall be eliminated.

As far as the method is concerned, I am not going to get into the sanitary engineering business yet, and I hope that I will never have to. From the evidence that I have heard, it seems to me the sensible thing to do is to collect, transport, and treat. The alternatives that are discussed seemed to me alternatives which long since should have been discarded as impracticable, and I truly wonder what purpose is served by any further temporizing about end of the pipe treatment or satellite treatment or any of the various possibilities that have been the subject of discussion.

It is time now for adoption of a particular [Tr. 14248] method that will result in the elimination of these over-

flows. I believe that faced with the necessity for doing that, Dr. Katz can get the job done. I will say that he has from the outset of this case impressed me as a person who is knowledgeable and sincere, and I believe that he can do it if he is given the cooperation he is going to need.

If the decision is to transport and treat, the defendants are either going to have to build some additional treatment facilities on a rather large scale, or they are going to have to build some detention facilities. From the evidence I have heard, it appears to me that the latter is the less expensive and more practicable alternative; but again, I am not going to order any particular method to be employed at this time. I am interested in results. The methods are a matter of design.

Now, turning from the matter of the discharge of raw sewage to the matter of treatment of all flows, including present dry weather flows and those wet weather flows which will in the future be collected and treated, I do not have the slightest doubt, on the basis of the evidence I have heard here, that for the protection of the interests asserted by the plaintiffs here and to effectuate the decision of this court, advanced waste treatment is [Tr. 14249] necessary. That treatment must consist of coagulation and filtration — not carbon filtration, but sand or multimedia filtration, as the design may dictate. The effluent standards that should be sought are 5 milligrams per liter of BOD and 5 milligrams per liter of suspended solids. Phosphorus of less than 1 milligram per liter should be sought, and I believe will be an inevitable consequence of the installation of the type of advanced treatment which is being ordered.

I am not going to enter any order today on the question of averages. I do not think I have enough information

to make a definitive statement on it. The considerations involved in the two kinds of injury we have been discussing here are, of course, different. The public health aspect of the case really requires that there be no input into the lake of an effluent which has not been effectively chlorinated, and, therefore, I can tell you now that any geometric average is out. It is going to have to be an arithmetric average, but of what dimensions, I am not sure, and I will not attempt to say now.

On the eutrophication question, on the other hand, an average would not hurt because it does not make any difference whether the pounds go in today or next week. If you have a limit of so many pounds a month, that will [Tr. 14250] get the job done. But the people of Illinois can be infected with viruses that result from one day or one hour of inadequate chlorination. The fact that there are no viruses on the other six days of the week reduces the exposure obviously, but it does not eliminate it to the extent it is possible to do so. And I believe that to the extent it is possible to do so, the law requires elimination of the hazard.

As far as the averages are concerned, I have the impression from Mr. Culp's testimony that the problem may take care of itself. He felt that Mr. Gupta's effluent standards really did not correlate very well with the treatment modes he was cost estimating, and it may be that the design the defendants come up with will, as in the case of Lake Tahoe, be sufficient to get effluent standards even below the 5 and 5 with no really remarkable peaks.

I have considered the possibility of appointing an engineer to work with the defendants. I believe I will not do that today. I am hopeful that the defendants will com-

ply with the terms of this order without the necessity of any close supervision by this court. The extent to which they do so will be a matter of their good faith and their desire to conform.

[Tr. 14251] As I had the pleasure of saying the other day, the counsel that have represented both sides in this case have been truly outstanding. If they continue during the time that lies ahead as they have in the past, I think that they can work out the details that are going to be necessary to put into effect the terms of this order within a reasonable time.

I will say that I believe time is a matter of importance. I will countenance no undue delay. On the other hand, I will be reasonable. I will not be oppressive. But the defendants must realize that they have a job to do and they must get about it.

I realize, too, that there will be an appeal in this case, and we will have to discuss the matter of a stay of execution at such time as that question arises.

The terms of this order are binding upon the defendants whether or not federal financial assistance becomes available. I hope that federal assistance is made available, but if it is not, the program decreed by this order must proceed nonetheless.

This brings us to the matter of cost, as to which there has been considerable controversy in this case. I think we should break it down into two things, [Tr. 14252] because it is easy to get carried away by the huge numbers that have been bruited about. In my view, the cost of eliminating the overflows is not really a factor here. It is a cost that this order will undoubtedly cause to be incurred long before it would have been incurred, but the cost of eliminating those overflows would

have had to have been borne by the City in any event at some time, unless, of course, it intended to ignore the opinions of its own expert witnesses to the effect that overflows are undesirable and must be eliminated. So whatever it costs to eliminate the overflows is not attributable to this lawsuit, except that this lawsuit has provided a catalyst for that expenditure.

Now, as to what is going to be involved in the cost of advanced waste treatment, I regard Mr. Gupta's figures, to the extent that they differ from those of Mr. Culp, as being wholly unfounded and speculative. When all is said and done, and when one finishes talking about the millions and tens of millions, it appears from Mr. Culp's testimony, and indeed from the testimony of the defendants' witness, Heaps, that what we are talking about here is something on the order of $2 a month per household in the District. Now, I do not mean to say that $2 per month per household is an insignificant or [Tr. 14253] insubstantial amount, but what I do suggest is that it is in those terms that this obligation should be measured rather than in the forbidding and ominous numbers with the long trains of zeroes at the end.

The defendants argue, again sincerely, that this is a matter of priorities and that they have questions of how much they are going to spend on their police department and how much they are going to spend on their fire department, how much for schools, and that this is a matter of ordering priorities. I agree that matters involving schools, fire protection, police protection, public libraries, are perhaps matters for the people of Milwaukee and Milwaukee County to decide for themselves according to their own values and structure of priorities, because those are local matters. Any wrong decision will have a local impact only.

Here, however, we are dealing with activities that affect not simply the people who reside in Milwaukee County, but rather affect a body of water which those people share with residents of other states. And while Milwaukee has the right to order its own priorities and the right to decide its own values, it does not have the right to order the priorities of the residents of other states or to dictate to them what their values ought to be.

[Tr. 14255][1] Now, I will hear from counsel on the question of when the timetable should be submitted. I have no idea how long it should take to prepare such a timetable.

What do you suggest, Mr. Moerke?

MR. MOERKE: Does the Court contemplate that timetable will be prior to September 9th?

THE COURT: Yes.

MR. MOERKE: I would assume that.

THE COURT: Yes, because the timetable will be incorporated in the judgment order by reference if not actual physical incorporation.

MR. MOERKE: If the Court please, I really have no reaction to that at this moment.

THE COURT: I did not know whether you would or not. I do not know either.

MR. MOERKE: I think I should consult with my clients.

THE COURT: All right.

Mr. Karaganis, do you have any suggestion?

[1] To Petitioner's knowledge, the official transcript does not contain a page numbered 14254.

MR. KARAGANIS: I would suggest that Mr. Moerke be given an opportunity to consult with his experts, and we will be glad to sit down with Mr. Moerke and work it out.

THE COURT: Let's do this. Let's have the two things coincide. Have the timetable or your explanation as to why you have been unable to devise one by September 9th.

[Tr. 14256] MR. MOERKE: All right.

THE COURT: We will enter the judgment order on that date and make any decision in regard to the timetable at the same time.

MR. MOERKE: If the Court please —

THE COURT: Yes, Mr. Moerke?

MR. MOERKE: Would the Court contemplate any time for possible motions that might be made by the defendants?

THE COURT: You are certainly entitled to make motions, Mr. Moerke. I would not want you to take any time to rehash what we have just spent —

MR. MOERKE: I understand.

THE COURT: — a long time doing, and I don't think in a bench trial, to preserve your record, you need to make a post-trial motion. I don't want any such motion to delay moving ahead with the case, but if you have any kind of motion you want to make, make it within the same time.

File it sometime before the 9th of September, and I will rule on that at the same time I rule on the judgment.

MR. MOERKE: All right, fine. Thank you.

(Which were all the proceedings had on the day and date aforesaid.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
and
PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,
vs.
CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

CIVIL ACTION
APPEAL NO.
77-2246

NOTICE OF
MOTION

MILWAUKEE COUNTY,
Applicant for Limited Intervention.

TO:

The Honorable William J. Scott
Attorney General, State of Illinois
By: Mr. Joseph V. Karaganis
Special Assistant Attorney General
Suite 2500, 150 North Wacker Drive
Chicago, Illinois 60606

The Honorable Frank J. Kelley
Attorney General, State of Michigan
By: Mr. Thomas J. Emery
Assistant Attorney General
Department
Lansing, Michigan 48913

Mr. James B. Brennan
City Attorney, City of Milwaukee
City Hall, Room 800
200 East Wells Street
Milwaukee, Wisconsin 53202

Mr. Michael J. McCabe
Director of Legal Services
The Metropolitan Sewerage District of the County of Milwaukee
735 North Water Street, Room 923
Milwaukee, Wisconsin 53202

Mr. Elwin J. Zarwell
Quarles and Brady
780 North Water Street
Milwaukee, Wisconsin 53202
Attorneys for Defendants-Appellants, The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee

PLEASE TAKE NOTICE that the undersigned will bring on for hearing the attached Motion before the Honorable Thomas E. Fairchild, Philip W. Tone, and Roy W. Harper, Judges and Designated Judge respectively of the United States Court of Appeals for the Seventh Circuit, at such time and place as the Court shall order.

Dated at Milwaukee, Wisconsin, this 21st day of July, 1978.

/s/ Robert P. Russell
ROBERT P. RUSSELL,
Corporation Counsel of
Milwaukee County

Attorney for Applicant
for Limited Intervention

Address:

303 Courthouse
Milwaukee, Wisconsin 53233
(414) 278-4300

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

and

PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

CIVIL ACTION
APPEAL NO.
77-2246

MILWAUKEE COUNTY,
Applicant for Limited Intervention.

MOTION OF MILWAUKEE COUNTY,
A GOVERNMENTAL BODY CORPORATE,
FOR LIMITED INTERVENTION AS DEFENDANT

ROBERT P. RUSSELL,
Corporation Counsel of Milwaukee County
Attorney for Applicant for Limited Intervention
303 Courthouse
Milwaukee, Wisconsin 53233
(414) 278-4300

(Title Page)

MOTION FOR LIMITED INTERVENTION

(Caption Omitted)

Pursuant to Rules 19 and 24 of the Federal Rules of Civil Procedure, Milwaukee County, a governmental body corporate and political subdivision of the State of Wisconsin, by its attorney, Robert P. Russell, Corporation Counsel, moves for leave to intervene as a defendant

in this action solely for the limited special purpose of asserting the defense set forth in its proposed motion to dismiss, of which a copy is hereto attached, on the following grounds:

1. Pursuant to Section 59.96(6) to (10) inclusive of the Wisconsin Statutes, Milwaukee County is required to provide funds for any budget amount requested yearly by the Metropolitan Sewerage District, and the county must raise said amount either "by tax levy or by issuing corporate bonds of such metropolitan sewerage district, or by a combination of a tax levy and corporate bonds, and make such amount available within the period of time designated by said metropolitan sewerage commission, which period shall not be less than 90 days from the date said budget is filed with the county board of supervisors." [Section 59.96 (7), Wis. Stats.]

2. Milwaukee County is the primary and major source of payment for the expenses of any clean water compliance program and for regular sewer management needs of the Milwaukee district.

3. Milwaukee County has an interest relating to the property which is the subject of the action and is so situated that the disposition of the action may impair or impede its ability to protect that interest.

4. Milwaukee County asserts a defense to plaintiff's claim that has not heretofore been presented by the present defendants and the determination of this action will be binding on applicant, Milwaukee County.

The foregoing motion is made in accord with a directive of the Milwaukee County Board of Supervisors, the governing body for Milwaukee County, by duly adopted resolution which became effective on June 20, 1978, a copy of which is hereto attached as Exhibit "A", incorporated herein by reference, and made a part of the instant motion.

Dated at Milwaukee, Wisconsin this 21st day of July, 1978.

/s/ Robert P. Russell,
ROBERT P. RUSSELL,
Corporation Counsel of
Milwaukee County

Attorney for Applicant
for Limited Intervention

Address:

303 Courthouse
Milwaukee, Wisconsin 53233
(414) 278-4300

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
and
PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

vs.

CIVIL ACTION
APPEAL NO.
77-2246

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

MILWAUKEE COUNTY,
Limited Intervenor-Defendant.

MOTION OF MILWAUKEE COUNTY,
A GOVERNMENTAL BODY CORPORATE,
FOR DISMISSAL OF ACTION

ROBERT P. RUSSELL,
Corporation Counsel of Milwaukee County
Attorney for Limited Intervenor-Defendant
303 Courthouse
Milwaukee, Wisconsin 53233
(414) 278-4300

(Title Page)

MOTION FOR DISMISSAL

(Caption Omitted)

The limited intervenor-defendant, Milwaukee County, by Robert P. Russell, its attorney, moves the court to dis-

miss the above entitled action, without prejudice to any rights of plaintiffs, on the following grounds:

1. Milwaukee County is a party whose joinder is now indispensable and necessary to the just and equitable adjudication of this action and was not made a party to said action when the matter was heard at trial in the District Court of the United States for the Northern District of Illinois;

2. The rendition of judgment herein by said district court without affording such party its just and equitable defense to this action on the issue of remedy has severely impaired that party's ability to protect its interest in the subject matter of the District Court's decision; and

3. The rendition of an appellate judgment other than dismissal of said action would likewise severely impair the ability of such party to protect its interest in the subject matter of the District Court's decision.

/s/ Robert P. Russell,
ROBERT P. RUSSELL,
Corporation Counsel of
Milwaukee County,
Attorney for Limited Intervenor

Address:
303 Courthouse
Milwaukee, Wisconsin 53233
(414) 278-4300

EXHIBIT "A"

BOARD OF SUPERVISORS
Milwaukee County

Official Proceedings — File No. 78-104 (Journal, January 17, 1978, pp. 73-5)

A RESOLUTION

UNFINISHED BUSINESS

(Item 3) A resolution by Supv. Mett directing the Corporation Counsel to investigate procedures to free Milwaukee County from the recent Federal sewer court judgment and orders, by recommending adoption of the first BE IT RESOLVED clause in File No. 78-104 appearing in the journal of proceedings of January 17, 1978, as follows, and placing the balance of said resolution, File No. 78-104, on file:

BE IT RESOLVED, that the County Board of Supervisors direct County Corporation Counsel to forthwith file an appropraite motion before the Seventh Circuit Court of Appeals staying their jurisdiction to hear any further appeal and requesting that they dismiss the case brought by the State of Illinois on the theory that an indispensable party to the litigation, namely Milwaukee County, was absent from the case or take action similar in its objective upon any theory available along the lines discussed.

BE IT FURTHER RESOLVED, that the Milwaukee County Board request the Metropolitan Sewerage District of the County of Milwaukee to demand a statutory hearing objecting to the denial of federal sewer construction funds to Milwaukee for constructing facilities ordered by the Federal Court.

OFFICE OF THE COUNTY CLERK

Milwaukee, Wis., June 21, 1978

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Board of Supervisors of Milwaukee County, at an Annual meeting (continued) of said Board held on the 23rd day of May, 1978, signed by the County Board Chairman and County Clerk on the 30th day of May, 1978. This resolution became effective on June 20, 1978.

Thomas E. Zablocki
County Clerk

AFFIDAVIT OF MAILING

(Caption Omitted)

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Erna M. Tesch, being first duly sworn, on oath deposes and says that at the City and County of Milwaukee, State of Wisconsin, on the 17th day of July, 1978, she mailed to the following persons true and correct copies of the Notice of Motion, Motion for Limited Intervention with proposed Motion for Dismissal attached thereto, and Legal Memorandum filed in the above entitled action, by securely enclosing the same in envelopes, properly addressed, and with the proper postage, certified mail, return receipt requested, affixed thereto, and by depositing the same in a U. S. Post Office mail box:

The Honorable William J. Scott
Attorney General, State of Illinois
By: Mr. Joseph V. Karaganis
Special Assistant Attorney General
Suite 2500, 150 North Wacker Drive
Chicago, Illinois 60606

Mr. Michael J. McCabe
Director of Legal Services
The Metropolitan Sewerage District of the County of Milwaukee
735 North Water Street, Room 923
Milwaukee, Wisconsin 53202

The Honorable Frank J. Kelley
Attorney General, State of Michigan
By: Mr. Thomas J. Emery
Assistant Attorney General
Department
Lansing, Michigan 48913

Mr. James B. Brennan
City Attorney, City of Milwaukee
City Hall, Room 800
200 East Wells Street
Milwaukee, Wisconsin 53202

Mr. Elwin J. Zarwell
Quarles and Brady
780 North Water Street
Milwaukee, Wisconsin 53202
Attorneys for Defendants-Appellants, The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee

*Honorable Bronson C. La Follette
Attorney General
State of Wisconsin
114 East, State Capitol
Madison, Wisconsin 53702

*Mr. Ross D. Davis
910 Sixteenth Street, N.W.
Washington, D. C. 20006
Attorney for National League of Cities

*Mr. James W. Moorman
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

*Mr. John J. Gunther
1620 Eye Street, N.W.
Washington, D. C. 20006
Attorney for United States Conference of Mayors

*Representing an amicus curiae

/s/ Erna M. Tesch
Erna M. Tesch

Subscribed and sworn to before
me this 21st day of July, 1978.
/s/ A. Frank Putz
Notary Public, Milwaukee County, Wis.

My commission is permanent.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1978.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. .....

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, and PEOPLE OF THE STATE OF MICHIGAN, Intervening Plaintiff-Appellee, No. 77-2246 vs. CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 72-C-1253 Judge John F. Grady

This matter comes before the court for its consideration upon the filing herein of the following documents:

1. The "MOTION OF MILWAUKEE COUNTY, A GOVERNMENTAL BODY CORPORATE, FOR LIMITED INTERVENTIN AS DEFENDANT" filed herein on July 21, 1978 by counsel for Milwaukee County.

2. The "LEGAL MEMORANDUM IN SUPPORT OF MOTION FOR LIMITED INTERVENTION" also filed herein on July 21, 1978 by counsel for Milwaukee County.

3. The "RESPONSE OF THE PEOPLE OF THE STATE OF MICHIGAN TO MOTION FOR LIMITED INTERVENTION" filed herein on July 31, 1978 by counsel for the intervening plaintiff-appellee.

4. The "LEGAL MEMORANDUM IN OPPOSITION TO MOTION FOR LIMITED INTERVENTION AND MOTION FOR DISMISSAL OF ACTON" filed herein on July 31, 1978 by counsel for the intervening plaintiff-appellee.

5. The "RESPONSE OF PLAINTIFF-APPELLEE STATE OF ILLINOIS TO MOTION OF MILWAUKEE COUNTY FOR LIMITED INTERVENTION" filed herein on August 11, 1978 by counsel for the plaintiff-appellee.

On consideration whereof,

IT IS ORDERED that the "MOTION OF MILWAUKEE COUNTY, A GOVERNMENTAL BODY CORPORATE, FOR LIMITED INTERVENTION AS DEFENDANT" be, and the same is hereby, DENIED.

STATUTORY PROVISION INVOLVED

1975 Wisconsin Statutes, pages 1213, 1214-1220
(as subsequently amended):

Section 59.96 Metropolitan sewerage commission. (1) APPOINTMENT OF COMMISSIONERS. In any county having a population of 500,000 or more where the common council of any city of the 1st class within such county has adopted a resolution declaring that it is necessary to provide sewage disposal works for such city and in which a sewerage commission has been appointed and qualified, and has adopted plans for, and commenced the construction of a sewage disposal plant for said city, the governor shall appoint 3 sewerage commissioners who shall constitute and be known as the "Metropolitan Sewerage Commission" of such county. One person shall be certified by the sewerage commission of such city of the 1st class and one person by the department of natural resources to the governor, who shall appoint as members of the metropolitan sewerage commission the 2 persons thus certified and shall name as the 3rd member of the commission a resident within the drainage area of said county outside of the city limits of such city of the 1st class. Not less than 6 weeks prior to the expiration of the term of any commissioner his successor shall be certified and appointed as provided above for a term of 6 years. A commissioner shall hold office until his successor has been appointed and qualified. Vacancies occurring during the term of any commissioner shall be filled in like manner, but for the unexpired term only.

* * *

(6) POWERS AND DUTIES. (a) The metropolitan sewerage commission shall project, plan and construct in such county outside of the city limits of such city of the first class but within the metropolitan sewerage district, main sewers, pumping and temporary disposal works for the collection and transmission of house, industrial and other sanitary sewage to and into the intercepting sewerage system of such district, and may improve any water-

course within the district by deepening and widening or otherwise changing the same where in the judgment of the commission it may be necessary in order to carry off surface or drainage water, and such power may be exercised outside the district in any case where any such watercourse flows from within the district to a point outside the district and then returns to the district, and such power may be exercised outside the district in any case where any such watercourse flows from within the district to a point outside the district. Such commission is hereby authorized and empowered to enter into a contract with such municipality or with any other governmental body which owns or has control of any such lands through which such stream flows for the payment of such part of the cost of such improvement in such municipality which is wholly or partly outside of the district as the municipalities and governmental bodies involved may agree upon. The commission may divert water from watercourses into drains, conduits or storm sewers, and may place storm, surface or ground waters therein and for such purpose is authorized to build drains, conduits or storm sewers, provided that no surplus or flood waters shall be diverted or by-passed into any stream or watercourse in another watershed.

(ab) 1. Before the metropolitan sewerage commission diverts water from any watercourse into an enclosed drain, conduit or storm sewer or similar structure, it shall apply to the department of natural resources for a permit for such diversion. Upon receipt of an application for a permit, the department shall fix a time, not more than 8 weeks thereafter, and a convenient place, for a public hearing thereon; it shall also give notice of such time and place to the metropolitan sewerage commission which shall cause the same to be published once each week for 3 successive weeks before such hearing in at least one newspaper designated by the department and published in the county.

2. In addition to such publication the applicant, not less than 20 days prior to such hearing, shall mail to

every person interested in any lands that will be affected by the proposed diversion and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing. This notice shall be accompanied by a general statement of the nature of the application and shall be forwarded to such persons by registered mail in a sealed and postpaid envelope properly addressed. Proof of such publication and notice shall be filed with the department.

3. At such hearing or any adjournment thereof, the department shall consider the application, and shall take evidence offered by the applicant and other persons in support thereof or in opposition thereto, may require the amendment of the application, and if it appears that the application is in the public interest, will not violate public rights and will not endanger life, health or property, the department shall so find and shall issue a permit to the applicant.

(b) The said metropolitan sewerage commission is authorized in its name to contract and to be contracted with, and to sue and to be sued.

(c) The metropolitan sewerage commission may require any town, city or village in such county, or any occupant of any premises outside of said city of the first class, located in such county, engaged in discharging sewage effluent from sewage plants, sewage refuse, factory waste, into any river or canal within such county within the drainage area hereinafter provided for to so change or rebuild any such outlet, drain or sewer as to discharge said sewage, waste or trade waste into the sewers of such city, town or village or into said main sewers by it established and under such regulations as the commission may determine.

(d) The commission may employ and fix the compensation of all agents, assistants, clerks, employes and laborers as it may deem advisable for the due and proper execution of its duties, and in its discretion may employ the chief engineer or agent or employes of any such city

of the first class, or of the sewerage commission thereof, as its engineers, agents or employes, provided, however, that the compensation fixed therefor shall not be paid to such person but to such city or such sewerage commission.

(e) The commission may enter upon the land in the cities, villages and towns in said county outside of said city of the first class for the purpose of making surveys or examinations in the performance of its duties.

(f) The commission may enter upon any state, county or municipal street, road or alley, or any public highway in said county outside of said city of the first class for the purpose of installing, maintaining and operating the sewerage system provided for in this section, and it may construct in any such street, road or alley or public highway, a main sewer, intercepting sewer or any appurtenance thereof, without a permit or a payment of a charge. Whenever such work is to be done in a state, county or municipal highway, the public authority having control thereof shall be duly notified, and said highway shall be restored to as good condition as existed before the commencement of such work, and all costs incident thereto shall be borne by the commission.

(g) The commission shall have power to lay or construct, and to forever maintain, without compensation to the state, any part of said system of sewerage, or of its works, or appurtenances, over, upon or under any part of the bed of any river flowing through said cities, villages and towns, or of any land covered by any of the navigable waters of the state, the title to which is held by the state, and over, upon or under canals or through waterways and under right of ways of railroad, interurban and street railway companies, and if the same be deemed advisable by the commission, the proper officers of the state are authorized and directed upon the application of the commission, to execute, acknowledge and deliver to the commission, such deeds, or other instruments, as may be proper for the purpose of fully confirming this grant.

(h) All persons, firms or corporations lawfully having buildings, structures, works, conduits, mains, pipes, tracks or other physical obstructions in, over or under the public lands, avenues, streets, alleys or highways of said cities, villages and towns which block or impede the progress of such sewer, when in process of construction, establishment or repair shall upon reasonable notice by the commission, promptly so shift, adjust, accommodate or remove the same at the cost and expense of such individuals and corporations, as fully to meet the exigencies occasioning such notice.

(i) Whenever necessary in order to promote the best results from the construction, operation and maintenance of the systems provided for in this section, and to prevent damage to the same from misuse, the commission, acting on behalf of the district, may make, promulgate and enforce such reasonable rules and regulations for the supervision, protection, management and use of said system as it deems expedient, and such regulations shall prescribe the manner in which connections to main sewers and intercepting sewers shall be made, and may prohibit discharge into such sewers, of any liquid or solid waste deemed detrimental to the sewerage system herein provided for. Such rules and regulations shall be adopted and enforced as provided by s. 62.61(2). Notwithstanding any other provision of law, such rules and regulations, or any special orders issued thereunder, may be enforced under s. 823.02 and the violation of any rule or regulation or any special order lawfully promulgated by said commission is hereby, in the discretion of the court, declared to be a public nuisance.

(j) The commission may acquire by gift, purchase, lease or other like methods of acquisition or by condemnation, any land or property situated in said county outside of said city of the first class, and all tenements, hereditaments and appurtenances belonging or in any way appertaining, or in any interest, franchise, easement, right or privilege therein, which may be required for the purpose of projecting,

planning, constructing and maintaining said main sewers, or any part or parts thereof, or that may be needed for the workings of said sewers when established, or that may be needed for improving any watercourse within the district by deepening and widening or otherwise changing the same but any stream over private lands not acquired shall only be altered if the governing body of the village, town or city in which said watercourse is located has approved of such proposed action and when so often as resort shall be had to condemnation proceeding the procedure shall be that provided for by ch. 32, and specifically the provisions of s. 32.05, except that the powers therein granted shall be exercised by and in the name of said commission in the place and stead of the county board. Notwithstanding any other provision of law to the contrary, all property, real or personal, acquired by the metropolitan sewerage commission or by the sewerage commission of the city of the first class shall be taken in the name of either of such commissions for the benefit of and belong to the metropolitan sewerage district. Whenever the sewerage commission of the city of the first class acquires property by condemnation proceedings, the procedure shall be that provided for by ch. 32, and specifically the provisions of s. 32.05, and all property so acquired shall be taken in the name of said commission for the benefit of and belong to the metropolitan sewerage district, and the sewerage commission of the city of the first class when exercising the power of eminent domain hereby delegated, shall determine the necessity for such taking. Such property, or any part or interest therein, when acquired, may be sold, leased or otherwise disposed of by such district by action of the metropolitan sewerage commission and the sewerage commission of the city of the first class acting jointly, whenever in the discretion of such commissions such property or any part or portion thereof or interest therein is not needed to carry out the requirements and powers of either of such commissions. This power shall also extend to personal property and to improvements on such real estate

or any tenements, hereditaments or appurtenances belonging to or in any way appertaining, or any interest, franchise, easement, right or privilege therein.

(k) Whenever the plans and specifications for any main sewer have been completed and approved by the sewerage commission of such city of the 1st class and by the department of natural resources as provided in ch. 144 and the commission has determined as provided in this section to proceed with the work of the construction thereof, it shall advertise by a class 2 notice, under ch. 985, for bids for the construction of the main sewer and its appurtenances in part or as a whole, as it deems advisable. Contracts for such work shall be let to the lowest responsible bidder, or the commission may reject any and all bids and if in its discretion the prices quoted are unreasonable or the bidders irresponsible, or the bids informal, it may readvertise the work or any part of it. With the consent of all its members it may itself do any part of any such works, by any labor under such conditions in every respect as it may prescribe. All contracts shall be protected by such bonds, penalties and conditions as the commission shall require.

(l) The powers of the commission shall not extend to or apply to the territory of any city of the first class which may be constructing, building and operating its sewerage system under a commission provided by law, except that the metropolitan sewerage commission may divert waters from watercourses into drains, conduits or storm sewers, may place storm, surface or ground waters therein, may enter into contracts for such purposes and may obtain funds therefor under sub. (7), subject to the provisions of pars. (a) and (ab).

(m) Said commission shall not construct any such main sewer nor alter or extend the same without having first submitted complete plans and specifications for the installation, alteration or extension, in writing, to the sewerage commission of such city of the first class and secured its approval thereof. All contracts entered into by

said commission for the construction, alteration and extension of any such main sewers shall comply with s. 66.29(9)(b).

(n) Said contract shall also contain a provision that the work of constructing said sewers shall be done under inspection to be furnished by the sewerage commission of such city of the first class, which inspection service shall be paid for at actual cost by the commission.

(o) Before any town, city or village or any private person or corporation shall be permitted to connect with or use any such main sewer provided for by this section, it shall obtain the approval of the sewerage commission of such city of the first class, which sewerage commission shall examine into it and hear all the parties in interest, and if it finds such sewer or system defective in construction, design, supervision or operation, it shall notify said metropolitan sewerage commission what alterations, new constructions or change in supervision or operation it shall require and deem necessary to correct existing and improper conditions and said metropolitan sewerage commission shall not permit such connection to be made or continued until such alterations, new constructions, change in supervision or operation shall have been made as provided in the determination of said sewerage commission of said city of the first class.

(p) Said metropolitan sewerage commission or said sewerage commission of said city of the first class, and their respective officers and agents are authorized to make examination of any and all sewers and sewerage systems within said county outside of the limits of said city of the first class for the purpose of determining if said systems are defective in operation, construction, design or supervision.

(q) When any such main sewer, pumping and temporary disposal works are completed they shall thereafter be operated, maintained and kept in repair and in sanitary condition by the sewerage commission of said city of

the first class, for the benefit of the metropolitan sewerage district.

(r) Nothing in this section shall be construed as restricting or interfering with any powers of the department of natural resources as provided by law, or with the powers granted to the sewerage commission of such city of the first class.

(s) Annually on or before September 1 the metropolitan sewerage commission and the sewerage commission of a city of the 1st class shall adopt a budget for the benefit of the metropolitan sewerage district of the county in which it is located, setting forth all of the improvements it intends to make during the ensuing year. Such budget shall be submitted to the county board of supervisors of such county. Such budget need only include the anticipated expenditures for the coming year and such budget shall be reduced by funds on hand and estimated revenues from any source. The district may during the budget year with the concurrence of two-thirds of its members, transfer amounts from one capital account to another when in the judgment of such commissioners such funds are not necessary to meet outstanding obligations. Nothing in this subsection shall be construed to impair any contractual obligation entered into either by the commission or by the district.

(7) FINANCING IMPROVEMENTS. (a) Whenever said metropolitan sewerage commission requires funds out of which to pay for the projection, planning and construction of said main sewers, pumping and temporary disposal works or for improving any watercourse within the district by deepening and widening or otherwise changing the same, or by diverting waters therefrom into drains, conduits or storm sewers, or for placing storm, surface or ground waters therein or for building drains, conduits or storm sewers, in the judgment of the commission pursuant to the exercise of the powers set forth in sub. (6) (a) or in other respects in connection therewith, it shall place the same in the budget. Thereupon such

board of supervisors is required and directed to provide for the amount so required by tax levy or by issuing corporate bonds of such metropolitan sewerage district, or by a combination of a tax levy and corporate bonds, and make such amount available within the period of time designated by said metropolitan sewerage commission, which period shall not be less than 90 days from the date said budget is filed with the county board of supervisors. Such bonds shall be payable at such time not longer than 20 years from the date of their issue as shall be determined by said board of supervisors, provided that when any part of an issue shall have a maturity greater than 10 years, such resolution shall require payment of the principal in substantially equal annual instalments during the life of such issue. Such bonds shall be payable in lawful money of the United States, bearing interest at a rate to be determined in said resolution. Such bonds shall be in such form as may be prescribed by such resolution, shall be signed by the chairman of said board and by the clerk thereof, shall be called metropolitan sewerage bonds, shall be consecutively numbered, shall have interest coupons attached and shall show on their face that the same are issued for the benefit of the metropolitan sewerage district. There shall be annually levied by said county board a direct tax upon all taxable property in said district sufficient to pay the annual interest thereon, and also to pay and discharge the principal thereof at maturity, and there shall be included in said tax levy an amount estimated by the board of supervisors to be sufficient to cover the loss and cost of the collection thereof, which tax shall be collected as provided in sub. (10). It shall not be necessary to submit any such bond issue to the vote of the people. The tax hereinabove provided to be levied shall not be included within the provisions of any county, town, city or village tax limitation statute.

(b) Upon the sale of any such bonds, the county board of such county shall pay the proceeds thereof to the county treasurer of said county for the credit of the said commission and said county treasurer shall, from time to time,

against said fund, pay warrants or checks when authorized by said commission and signed by the chairman and secretary thereof.

(c) Whenever the sewerage commission of such city of the 1st class requires funds out of which to pay for the projection, planning, construction and maintenance of a sewerage system for the collection, transmission and treatment or disposal of house, unpolluted industrial and processed waters and other sewage, or for the improvement of any watercourse within the district by deepening and widening or otherwise changing the same, or for constructing, maintaining and operating flushing stations and tunnels or for constructing, building and maintaining its sewage disposal or treatment plants in connection therewith, it shall place the same in the budget. Thereupon such board of supervisors is required and directed to provide for the amount so required by tax levy or by issuing corporate bonds of such metropolitan sewerage district, or by a combination of a tax levy and corporate bonds, and make such amount available within the period of time designated in the resolution of said sewerage commission, which period shall not be less than 90 days from the date such budget is filed with the county board of supervisors. Such bonds shall be payable at such time not longer than 20 years from the date of their issue as shall be determined by the board of supervisors, provided that when any part of an issue shall have a maturity greater than 10 years, such resolution shall require payment of the principal in substantially equal annual installments during the life of such issue. Such bonds shall be payable in lawful money of the United States, bearing interest at a rate to be determined in said resolution and such bonds shall be in such form as may be prescribed by such resolution, shall be signed by the chairman of said board and by the clerk thereof, shall be called metropolitan sewerage bonds, shall be consecutively numbered, shall have interest coupons attached, and shall show on their face that the same are issued for the benefit of the metropolitan sewerage district. There shall be annually levied by

said county board a direct tax upon all taxable property in such district sufficient to pay the annual interest thereon, and also to pay and discharge the principal thereof at maturity, and there shall be included in said tax levy an amount estimated by the board of supervisors to be sufficient to cover the loss and cost of the collection thereof, which tax shall be collected as provided in sub. (10). It shall not be necessary to submit any such bond issue to the vote of the people. The tax hereinabove provided to be levied shall not be included within the provisions of any county, town, city or village tax limitation statute.

(d) Upon the sale of any such bonds, the county board of such county shall pay the proceeds thereof to the city treasurer of said city of the first class to the credit of the said sewerage commission of said city and said city treasurer shall, from time to time, against said fund, pay warrants or checks when authorized by said commission and signed by the chairman and the secretary thereof.

(e) Bonds issued pursuant to pars. (a) and (c) of this subsection shall be combined into a single issue when the metropolitan sewerage commission and the sewerage commission of such city of the first class shall so request in the resolution specified in said pars. (a) and (c).

(f) Any part or all of any tax levied by the county board against an entire city, village or town and certified to a city, village or town clerk, may be paid in whole or in part out of the general fund of the city, village or town in lieu of placing said tax upon the local tax roll. Any city, village or town which shall, prior to the time for the levy of taxes, have money in its general fund appropriated for that purpose, may by resolution determine that the taxes levied pursuant to pars. (a) and (c) and apportioned to it shall be paid to the county in whole or in part from such money in the general fund, which money, in the amount determined by such resolution, shall thereupon be segregated and used for no other purpose. The amount of such tax thereafter spread on the

tax rolls of such city, village or town may be reduced by the amount so segregated from the general fund.

(8) APPORTIONMENT OF COST. (a) Except as provided under s. 59.964, before February 1 in each year the sewerage commission of a city of the 1st class shall estimate and by resolution determine what sums in their judgment will be required to meet the expenses and disbursements of the sewerage commission of the city for the current fiscal year and shall include in such estimate and resolution as a part of the expense of the operation of such sewerage system all the expense of operation and of keeping in repair the sewerage system and disposal plant, including the main sewers, pumping and temporary disposal works and other plants, constructed by the metropolitan sewerage commission, and shall estimate and report the proportion thereof that will be due from each city, town or village in the drainage area in payment for the transmission and disposal of its sewage and for keeping in repair the intercepting sewers and disposal plant, including the main sewers, pumping and temporary disposal works and other plants, constructed by the metropolitan sewerage commission, and each city, town or village shall pay that proportion of the whole expense as the amount of sewage it contributes bears to the total amount of sewage disposed of by the city, in such disposal plants.

(9) TAX LEVY; POWERS OF TOWNS. (a) Except as provided under s. 59.964, a sewerage commission of a 1st class city shall, on or before October 1 of each year, certify in writing to the clerks of the several cities, towns and villages having territory in the drainage area, the total amount necessary to pay the expenses for the transmission and disposal of the sewage for the year and the share thereof that each city, town and village must pay after the report has been made under sub. (8).

(am) Upon the receipt of the report under par. (a) by each clerk, the clerk shall submit the report to the next regular or special meeting of the governing board

of the city, town or village and the board shall, by resolution, levy and assess taxes sufficient to pay the same, against all of the taxable property included within the drainage area in the town, city or village. Following the assessment and levy, the clerk of each city, town or village shall place the same upon the tax roll to be collected as other taxes are collected upon all of the taxable property within the drainage area, and moneys collected shall be paid by the treasurer of each city, town or village, to the treasurer of the 1st class city to the credit of said sewerage commission of a 1st class city. In lieu of the foregoing, any city, village or town may pay any charge certified under this subsection and recover the same in the rates charged users of the service under s. 66.076(5).

(b) There is imposed upon all towns in counties in which under the provision of this section a metropolitan sewerage commission is created and appointed, all of the powers vested in villages under chapter 61 of the statutes relating to the power of villages to finance, assess, build, construct and maintain sewerage systems, mains, laterals, drains and all appurtenances, and all of the duties by such provision imposed upon the village boards or villages, their several committees and village clerk, shall be performed in such towns by the town boards and town clerks thereof; provided, that the town board of any such town may lay sewers or water mains along either or both sides of any street or highway in the town, and in that event shall assess the cost thereof only against the property abutting and adjoining upon that side of the street or highway in which the sewer or water main may be laid; and all notices and specifications required thereby may be made and given by the towns in such work where no newspaper is published therein by posting five copies thereof in five public places in said town, and all duties by such provision imposed upon village clerk and village treasurer in extending upon the tax roll and collecting all assessments and taxes relating to such improvements, shall be performed in the same manner by town clerks and town treasurers of such towns.

(c) The metropolitan sewerage commission and the sewerage commission of a city of the 1st class acting jointly may on behalf of the metropolitan sewerage district contract with any city, town, village, sanitary district or metropolitan sewerage district organized under ss. 66.20 to 66.26 in such county wholly or partly outside the boundaries of the metropolitan sewerage district, or wholly or partly outside of such county but in the same general drainage area as the metropolitan sewerage district for the transmission, treatment or disposal of sewage from any territory located in such city, town, village, sanitary district or metropolitan sewerage district so organized. Before any city, town, village, sanitary district or metropolitan sewerage district so organized shall be permitted to connect its sewers with or use any main sewers, such sewers shall be approved as provided by sub. (6) (o). The governing board of any such city, town, village, sanitary district or metropolitan sewerage district organized under ss. 66.20 to 66.26 by a vote of three-fourths of its members may enter into such contract and except as provided under s. 59.964, may levy irrepealable taxes for the term covered by the contract for the cost of such service as determined by the contract upon the whole city, town, village, sanitary district or metropolitan sewerage district organized under ss. 66.20 to 66.26, or upon such part thereof as the governing board determines by such vote to be benefited thereby.

(10) LEVY AND COLLECTION OF METROPOLITAN SEWERAGE TAXES. The taxes levied pursuant to subsection (7) (a) and (c) shall be apportioned to the several towns, villages and cities situated within the metropolitan sewerage drainage area in the manner provided by section 70.63, and may be spread upon the respective real estate and personal property tax rolls of said towns, villages and cities, combined with county taxes, and shall be treated for all purposes, including settlement with the treasurers of the towns, villages and cities in the same manner as county taxes but shall not be included within any limitation on county taxes.

By Supervisor Mett File No. 78-1108

A RESOLUTION

Authorizing appeal of the
order denying County entry into
the Illinois-Milwaukee sewer lawsuit

WHEREAS, on August 24, 1978, the 7th Circuit Court of Appeals denied Milwaukee County's request to intervene in the federal sewer lawsuit between Illinois and Milwaukee; and

WHEREAS, if no appeal is taken from this denial, the rights of Milwaukee County in this lawsuit may for all times be determined; and

WHEREAS, it appears that this appeal must be taken in the form of an application for a writ of certiorari to the U.S. Supreme Court; now, therefore,

BE IT RESOLVED, that, because under U.S. Statutes (28 U.S. Code, Section 2101e) such an application — or appeal — must be taken before the Appeals Court rules on the appeal of the case itself, the Milwaukee County Board authorizes County Corporation Counsel to forthwith apply to the U.S. Supreme Court for a writ of certiorari to review and overturn the denial by the 7th Circuit Court of Appeals of the motion by Milwaukee for intervention as an indispensable party.

OFFICE OF THE COUNTY CLERK

Milwaukee, Wis., November 16, 1978

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Board of Supervisors of Milwaukee County, at an Annual meeting (continued) of said Board held on the 9th day of November, 1978, signed by the County Board Chairman and County Clerk on the 9th day of November, 1978, and approved by the County Executive on the 14th day of November, 1978.

/s/ Thomas E. Zablocki
Thomas E. Zablocki
County Clerk